

THE DISTRIBUTION OF OWNERSHIP

BY

JOSEPH HARDING UNDERWOOD, A. M.,
Professor of History and Economics, University of Montana

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
IN THE
FACULTY OF POLITICAL SCIENCE
COLUMBIA UNIVERSITY

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PREFATORY NOTE

FOR opportunity and aid the writer is grateful to Professor Isaac A. Loos, of the University of Iowa; to Miss Margaret A. Schaffner, Ph. D., now of the University of Wisconsin, and to Professors Franklin H. Giddings and Edwin R. A. Seligman of Columbia University.

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CHAPTER I

OWNERSHIP

"OH, wealth, sought after, much prized, which we abuse while we have it not, which we forget to hate when it is in our grasp." ¹ Herr Von Vollmar, the socialist, hates the idea of "private property." Herr Von Vollmar, the gentleman, loves his estate, because it makes Herr Von Vollmar, the socialist, a more efficient advocate of social ownership. There is no mystery in this forgiveness, for an "exemption from self love is not to be found in this world." ² Wealth is a part of the self that is loved. "Property is but the periphery of my person extended to things." ³ "Property is the environmental complement of the personal spiritual heritage of the ages." "Das Eigentum ist ein unzertrennliches Attribut der Persönlichkeit des Menschen." ⁴ "Proprietary rights are extensions of the power of a person over portions of the physical world." ⁵ Certainly an "attribute" or a "personal periphery" or a "power" is a "property" of that to which it attaches. Call possessed wealth, then, the outer personality of its possessor. If this outer personality is completely subject to the inner personality, it may be called the peculiar property

¹ *Rig Veda*, sect. I, lect. I, hymn v: 4.

² *Laws of Manu*, ii: 1.

³ Von Ihering, quoted in *American Law Review*, 29: 171.

⁴ Samter, Adolph, *Das Gesellschaftliche und Privat-Eigentum als Grundlage der Socialpolitik*, p. 5.

⁵ Holland, T. E., *Elements of Jurisprudence*, p. 178.

of the individual—it is his “private property.” Thus on Herr Von Vollmar’s estate one man is a servant, one is a tenant, one is a landlord. Now the land is the “environmental complement” of whatever “spiritual heritage” each of these several men has got out of the ages. Only the landlord, however, has his will. The land is peculiarly the outer personality, then, only of Herr Von Vollmar—is his “private property.” Peripheral expansion, then, may be impeded. Certainly the personality—if will is personality—of Herr Von Vollmar’s tenant cannot expand as freely as that of his master. Private property, then, is not merely appropriation but disappropriation. The same stimuli of internal wants and the same stimuli of external satisfactions of those wants that led one person to look upon the world, to respond to its satisfactions and to accommodate himself to its terms—to extend his personality over it—produced like responses in another person in the same external area. Thus persons are in conflict. It is not certain whose “periphery” is to be extended over the game and the grain and the slaves. If all of this environment or external personality is to be “private” to either of the persons who contest for its appropriation, one of these persons must be entirely subjected to the will of the other. The degree of the advantage which one may gain in the contest is the degree of his liberty—or of his power to realize his own will. This advantage in the contest is private property.

Individual wills, however, are transitory. New personalities or wills arising change the distribution of advantages and disadvantages. Change is not sudden but continuous. Dominance may not be exchanged for subjection at once, but a mutual impediment of wills may arise. In time antagonism becomes tolerance. Conflict becomes truce, balance, equilibrium. Then the “environ-

mental complement"—the external personality—cannot be "private," but must be mutually possessed, socialized. Degrees of advantage and of disadvantage of course remain in this mutual possession. Since it is not a peculiar or "private property" of the individual, since his liberty of will has been modified, his property must have a new name. Call it the status, or estate, of the individual with reference to other individuals. Private property is advantage or liberty; estate is mutual impediment or balance. Speaking after Spencer, it is economic "equilibration." Ownership, then, whether private property or estate, is social concession or submission. It is the sanctioned projection of a man's self into society.

Because a man's wealth "consisteth not in the abundance of the things which he hath," because a man's spirit may be inwardly rich inversely to its outward security, he may be deferred to. Yet a man's "periphery" is usually measured in terms of economic ownership, which is the tangible measure of the social submission to his will. The power that arises from customary or affectionate allegiance may more often than not be found to be the "long result of time"—the residue of former contributions of goods and services to the ancestral personality. The ancestral "periphery" may not have been obliterated at the same time that its material contents were lost. At any rate the opposition between pride of birth and pride of wealth is modern.¹ Homer's heroes and the heroes of the *Nibelungen Lied* are noble and rich. In later Greek literature, pride of birth is identical with pride in seven wealthy ancestors in succession.

In support of this analysis of property Blackstone may now be invoked. "The essence of property does not con-

¹ Maine, *Early History of Institutions*, p. 134.

sist in human control over things, but the essence of property consists in the relations among men which arise out of a contact of men with external physical nature."

Ownership measures the control over men. Holland analyzes a right into four essential elements: a person entitled, an object, an act of forbearance and a person obliged.¹ If there were no other men whose actions could be governed either negatively by exclusion from material goods, or positively by contributions to their wants from material goods, there could be no ownership. Accordingly men were once held directly as a part of "external physical nature." In eastern Africa the ambition of every negro is to have slaves that he may no longer have to work himself, but live at ease.² The African is another Aristotelian. Aristotle said: "In the rudder the pilot of a ship has a lifeless instrument, in the lookout man a living instrument."³ This absolute possession was regarded as in the nature of things, as indeed it was. A warlike species of ant, *formica sanguinea* has subjugated a negro species, *formica fusca*. And all races have followed the injunction, "Go to the ant." The trace of property in men is universally written in the law of master and servant. In most civilized countries a man is held liable for the faults and wrongful acts of his servant.⁴

When goods are relatively less easily appropriated, when custom has attached men to homes, it is unnecessary to own men in order to get their services. It is necessary only to own their homes. Even so much as the direct ownership of material goods may become unnecessary to the control of men. In the redistributions caused by economic "equilibration" the negative and the positive control of men may

¹ *Op. cit.*, p. 127.

² Letourneau, *Evolution of Property*, p. 98.

³ Jowett, *Politics*, bk. 1: 6.

⁴ Pollock, *Jurisprudence*, p. 50.

be exercised through customary submission, even in the absence of part or of all of the objects of "external physical nature" out of which the relation originally arose. Instead of things, representatives of things are now the instruments of control. Thus a stock is a representative of things, which at a favorable turn of the market, may be converted into possessions and services of greater extent than those which the stock represents. A stock may indeed be created and traded for goods without representing anything. But this capitalized compliance is available only as men think that the stock represents things or as they think that they can share in the extortion. A stock, which is a "fraction of all the rights and duties of the stockholders composing a corporation," will soon be inconvertible into real things, if the "rights" of stockholders are not capable of being physically enjoyed and if the duties of stockholders are not performed. Almost the sole value of these rights is in the power to control services or labor, and "the practical ownership of its employes involved in the position of a monopoly" is not different from that "practical ownership" of men that results from the possession of any position from which other men may be excluded, but not without their serious loss.

Ownership, then, is a relation, not a mere possession. It may be represented:

Ownership of men	{	as things
		through things
		through representatives of things.

CHAPTER II

DISTRIBUTION

THE history of ownership is the history of an alternation between relatively private property and tendency to estate. Absolute private property could be found only in an absolute tyranny or in seclusion. Complete equilibrium could be found only in some chimerical pure democracy. There is no such thing as "private property." As the inner personality is not private but rather a synthesis of derived emotions and ideas, is social, indeed, as "one's individual personality is for the most part a product of one's intercourse with other personalities,"¹ so the outer personality or property cannot be entirely private. Entire privacy of either the inner or the outer personality would be the direst poverty to the "social animal." "The right of property has two elements, social and individual."² The "orbit" of the individual's outer personality contains the "infringement" of the personalities of other individuals. That the term "private property" is not used in an absolute sense is seen in the common definitions. Blackstone says:³ "Private property is the sole and despotic dominion which one man claims and exercises over external things of the world in total exclusion of any one else in the universe." Suppose for a moment that "sole and despotic dominion" and

¹ Giddings, F. H., *Democracy and Empire*, p. 31.

² Fichte, quoted in de Laveleye, *de la Propriété*, p. 54.

³ Bk. ii: 1.

"total exclusion" were possible, these alone would give little value to property. A man might be in the middle of a field of a thousand acres all alone. If he were unable to cultivate it himself, and other men should determine to concede to him his right of "total exclusion," so that he could command no assistance in the cultivation of his field, his "sole and despotic dominion" would be worth little more than the empire over an iceberg. "Private property is the right to enjoy and dispose of certain things in the most absolute manner, as he pleases, provided he makes no use of them prohibited by law."¹ But the law is nothing but the social infringement of the individual's "absolute manner." "Private property is the right in chattels in no way dependent upon another man's courtesy."² The universal existence of laws of property is evidence of the tenure of property by "courtesy." Austin defines private property as "a right over a determinate thing, indefinite in point of user, unrestrained in point of disposition and unlimited in point of duration."³ An examination of the conditions of ownership makes it seem necessary to drop the negatives of the last definition. John Stuart Mill says that private property is the right to one's own faculties.⁴ But ownership of only one's own faculties would be poverty. To these loose definitions may be opposed the more exact statement of Von Ihering: "It is not true that property carries with it an absolute right of control. Property in such a form cannot be tolerated by society and never has been tolerated. The idea of property cannot carry with it anything that is contrary to the idea of society."

¹ *Dow vs. Guild*, 31 Cal., 637.

² *American and English Law Encyclopedia*, xix: 284.

³ *Jurisprudence*, p. 477.

⁴ *Political Economy*, i, 28.

How does the idea of society limit the idea of property? "The right of property is so far limited that its use may be regulated from time to time by law, so as to prevent its being injurious to the equal enjoyment by others of their property or inconsistent with the rights of the community."¹ The power of the state over private property is well defined: "it may take the property for a public use, upon compensation being made or secured. It may take by taxation. It may control the use so as to secure equal enjoyment."²

Since absolute private property is impossible, what content shall be given to the necessary term private property? "Property is all the undefined uses of a thing which remain over after the definite and specific uses of others have been deducted." It is an "indefinite residuum."³ It is essential to the individual's self realization that he possess the greatest allowable residuum. "A man does not possess a demesne because he is a prince, but he is a prince because he possesses a demesne."⁴ Seneca said: "It is the census that raises a man to the dignity of a senator."⁵ "Die Mensch ohne Eigenthum hört auf Mensch zu sein."⁶ The financial magnate is more potent politically than the politician. His power is like that of the Nukahiva chieftain, who had a right to be chief because of the number of his breadfruit and cocoanut trees;⁷ or of the old Brehon chieftain whose authority was based on the number of his cows. If material property is essential to the complete expression

¹ Washburn, *Real Property*, vol. 2, p. 2.

² Anderson, *Dictionary of Law*, "Private Property."

³ Commons, J. R., *Distribution of Wealth*.

⁴ Haller, quoted in Loria, *Economic Foundations of Society*, p. 331.

⁵ Quoted in Loria, *op. cit.*, p. 137.

⁶ Samter, *op. cit.*, p. 3.

⁷ Letourneau, *op. cit.*, p. 70.

of powerful personality, it is no less essential to that of lesser persons. "Property is an absolute condition of liberty."¹ Booker Washington says: "What the negro needs is private property, Christian character and education." Civil duties and capacities attach chiefly to economic property, as does the sense of responsibility. If then democracy is desirable, it is equally desirable that those who shall exercise civil duties shall have that security that develops responsibility. Aristotle said:² "Make even the poor owner of a small inheritance. The equalization of fortunes is the only method of preventing discord." Aristotle and Plato sought equality of conditions in ideal constitutions by limiting accumulations, as Lycurgus and Minos are said to have based real constitutions on new divisions of property; and every political idealist since has based the state on a relatively equalized property.

If social institutions guarantee inviolability of person, they must also guarantee security of outer personality or property. The sacredness of private property was expressed by Plato:³ "If a man leaves behind him some part of his property, whether intentionally or unintentionally, let him who may come upon the left property suffer it to remain, reflecting that such things are under the protection of the goddess of ways and are dedicated to her by the law." "Thou shalt not, if thou canst help, touch that which is mine, or remove the least thing which belongs to me without my consent; and may I be of a sound mind and do to others as I would that they should do to me." "May I never pray the gods to find the hidden treasure which another has laid up for himself and his family, he not being one of my ancestors, nor lift if I should find such a treas-

¹ Laveleye, *op. cit.*, p. 334.

² *Politics*, v: 1.

³ *Laws*, bk. xi.

ure." This divinity of property has been assailed by thieves and communists and most effectually by the covetous, who has most violated Plato's golden rule of property, whose one prayer to the gods is that he may find the hidden treasure, whose wand for its location is a representative of a thing, a stock, a bond, a mortgage, an usury. Naboth lost his patrimony by force; he would now lose it by mortgage or by speculation, and the new possessor need not appease the paternal divinities. The modern stock exchange makes the altar of the goddess of ways a cashier's counter and exhibits in new ways the anthropomorphism of the divinity of property. The avaricious deface their own Hermes. Since property is relation to men, sacred regard for any relation among men which subjects some men to others can be preserved only by the stability of the visible symbols of ownership. Accordingly patrimony loses sacredness with greater ease of transfer, with the developing immateriality of property. Immaterial rights facilitate encroachments on property. Then the efforts of government to fix the elusive quantity lessen private prerogative and bring social interest into plainer view. Not anarchism but the unsocial use of privilege is to be feared by those who lament the loss of content in the term private property. By the enforced intervention of government the social interest is made more conscious of itself, and less assured of the divinity of its institutions. It is then governed less by reverence and more by expediency.

As there is no private property which is not subject to social subtractions, so no completely balanced state is possible. The sacredness of property is not more a protection to the possessors of external physical nature and of servants than it is an incentive to those who do not possess to struggle for a share. The more secure a position the more desirable is its attainment. The struggle to attain

results periodically in a passing equilibrium of opposing classes and individuals. It is, however, but an unstable equilibrium, or estate. Those who have less in the estate are no more content to remain long submissive to the division than are those who have a less share in the regime of private property. Those who have lordship in estate are no more content with their present powers than are those who have large private property. Private property and estate are respectively no more than names for a relatively individualized and a relatively socialized distribution of things. The height of private property is no more than the point in the conflict where the beginning of the swing back to estate is inevitable. This change is inevitable because the private property will not stop growing and the number of those included positively or excluded negatively in its dominance of external physical nature also does not stop growing and contending, periodically at least, for greater rights. In time the owner of much private property is too feeble through the very extensiveness of his claims to deny increasing rights to these. The privileges which he is compelled to allow to his inferiors are soon hardened into customs. This is estate. The height of estate is also no more than the point at which the swing back to private property begins. It is the name given to property when the residuum of private rights is least. Each stage contains the next in germ. "Since the tendencies toward both cohesion and dispersion are persistent, the social system simultaneously exhibits phenomena of combination and of competition, of communism and of individualism. Neither order of phenomena can ever exclude the other, but at any given time one or the other order may be ascendant and there may be a rhythm of alternating ascendancy of combination or competition, communism or individualism."¹

¹ Giddings, F. H., *Principles of Sociology*, p. 399.

It may also appear that the diffusion of liberty, understood as relative privilege or security, has been continuous through the alternations of private property and estate. While personal advantage and expansiveness may be more unchecked in an epoch of private property, limitation of such liberty results in extension of privilege to larger numbers, both immediately in greater security of estate and subsequently in the epoch of private property. Liberty is increased quantitatively as well as qualitatively in this inclusion of numbers. Thus the processes of liberation and of limitation are equally essential in the evolution of better distribution—of a better social adjustment. In limitation the greater freedom of a few becomes the comparative freedom of many. That greater freedom may have been specious, because its chief support was personal force. By limitation liberty may gain in security more than it loses in extent. Social adjustment gains in stability with the multiplication of those who are interested in stability.

CHAPTER III

ANCIENT OWNERSHIP

THE primitive man, like the cercopithecus, probably appropriated only what he ate. Such possession was not ownership. It had no extension in time or in space. It had no other support than the physical strength of the possessor. There was no established relation among men. The Bushman has no house. He lays up nothing for the future. He possesses as an individual the food that he has in his hand, the woman that he keeps by his side. He owns nothing that he does not hold. There is no property until foresight begins. If any ownership may be assumed here it is private property; it is, indeed, individualism.

Where the individual is a determinate clan, individualism passes into communism. Early liberty, which has no support but that of physical strength, is checked by a relative equality of condition, because when unaided and unvaried by external powers men are nearly equal. This equality soon becomes the unity of communism. If the savage clan has too little for its needs, and if it must fight with another clan, why should the individual fight with his clansman for more than enough? Or if the savage clan sprang up first where nature was profuse, why should the individual concern himself to take more than enough? The whale cast up by the sea is shared by all the clan, so is the captive. Even after captives and women are used as domestic animals rather than as food and trophies, thereby making land more than a place to pitch tents, doubtless the

clan at first owns them. The clan disposes itself on the land not with reference to ownership, but with regard to kinship. If it stays in one place, it obtains a consciousness of territorial claim, but subdivides it only for purposes of cultivation, and periodically reallots it to its members. It is the work rather than the land that is allotted. No one wants to own more land when ownership means only more work for himself. So the Kaffirs have no private property in land, but reallot it.¹ Throughout Africa are the survivals of the old communal clan.² Primitive communism was general. The Australian clan holds the property even to clothing and women.³ The Eskimo clan owns its ice pack. The Iroquois lived in long houses, and the Pueblos in their *casas grandas*. The Jesuits perfected aboriginal communism in Paraguay for the love of God and for the gain of earthly dross.

The barbarian who has been fortunate in his allotment and in his possession of "domestic animals" likes his place; and private property must be supposed to have very early and very generally taken the place of primitive communism. For the habit of letting the strong man alone in his possessions is easily developed. Habit is custom. Custom is law. Ownership in land approximates to the already well developed forms of property in weapons, utensils and slaves. Private property is found in process of development among many savage tribes. Thus the Hottentot who has no land, has cattle. Some Hottentots have no girls; others have many and these can buy more oxen. So there are found, just as in civilized society, the improvident poor and the prudent rich who buy girls of six or seven with an eye to

¹ Letourneau, *op. cit.*, p. 88.

² *Ibid.*, p. 107.

³ *Ibid.*, p. 37.

future wealth.¹ In all periods the status of women and children will be found approximating that of other property. It may be cited as some evidence that a rudimentary stage of private property followed the primitive communism and preceded patriarchal property, that those savage tribes whose ownership is apparently private are lower in the scale than those where family ownership has grown. The African tribes whose individuals are said to own absolutely are inferior to the Javanese *dessas*² in which the common welfare precedes the welfare of the individual. Aristocracy begins among the Kaffirs. The society on the Gaboon has its strong boxes and its social elect, who live nobly, do nothing and are well fed. Among the American Indians may be seen a transition from communism to private property. The Eskimo may pitch his igloo apart from his fellows and forego the right to their help.³ The concentration incident to private property is as marked in this period of liberty of property as in periods of more advanced civilization. King Kamrasi, on Lake Albert Nyanza,⁴ took the goods of his subjects to lavish on his friends, as later English monarchs took the goods of their subjects to lavish upon the monopolists. The Malay king of Bantam was heir in chief to the whole country, and when a man died the sovereign appropriated not only his fortune but his wife and children, whom he made slaves.⁵ The New Caledonian chiefs absorbed the ancient rights of the community.⁶ The subject's ownership, such as it was, must have been private property, since such confiscation is less possible under family ownership. Monarchy can develop only with private property.

If this liberty of barbarian ownership did exist, it al-

¹ Letourneau, *op. cit.*, p. 79.

² *Ibid.*, pp. 122-3.

³ *Ibid.*, p. 155.

⁴ *Ibid.*, p. 93.

⁵ *Ibid.*, *op. cit.*, p. III.

⁶ *Ibid.*, p. 77.

most everywhere integrated into family ownership, which is the first historical form of ownership. "The suggestion may be admissible that at least in some cases "family ownership" or the semblance of it, may really be not the origin but the outcome of intestate succession."¹ As the habit of letting alone the strong savage gave him private property, so in turn, the chief's habit of letting alone his family or his favorites in their customary enjoyment of his beneficence creates a status which he finds it easy to let alone. "Habit is the enormous fly-wheel of society."² The chief was imperceptibly reduced in most cases to an administrative official of the estate which became the unit of society. With Fustel de Coulanges it may be denied that family ownership is "agrarian communism," yet it is certainly more like estate than like private property. If, as Pollock and Maitland say:³ in co-ownership, the land is owned by individuals, their possession is certainly not the same sort of individual ownership as that which is not in co-ownership. Even the despotic ownership of the Hebrew patriarchs was not an ownership which could disregard the well being of the inferior person in his family. Although Abraham's "substance was great," he might have found it difficult to disregard the sustenance of Eliezer of Damascus; for, while Eliezer was the slave of Abraham, he was also his steward, and in the absence of Isaac, he would have been his chief heir, not because Abraham could have willed it so, but because, though he had "great store of servants," they had a customary right to have their relation to the patriarch transmitted to the heir. These slaves, or household retainers, could be transferred, but not to strangers. A man

¹ Pollock and Maitland, *History of the English Law*, vol. ii, p. 247.

² James, *Psychology*, vol. i, p. 121.

³ *History of the English Law*, vol. ii, p. 243.

might sell his daughter as a concubine, but not to a stranger;¹ while the price of a wife was fifty shekels.² A man might even sell himself, but at the end of six years from the beginning of servitude he could "go out free for nothing."³ If the man liked his master he might have his ear affixed to the door with an awl. But even then the fiftieth or Jubilee year freed the servant from the master's property right. And the patriarch must treat the servant well, not "as a bond servant, but as a hired servant and as a sojourner;" he must not "rule over him with rigor." And to his handmaiden, as to his ox and his ass, he must give rest on the sabbath. And although Abraham purchased Sarah for Isaac "with jewels of silver and jewels of gold and raiment and gave also to her brother and to her mother precious things;"⁴ and, although Jacob paid a high price for Rachel and Leah, and Othniel won Achsah, the daughter of Caleb, by his exploits, and David procured thus a daughter of Saul; although the concubines of David descended to his son;⁵ although the kinsman had to take the women with the estate, as Boaz purchased Ruth, the Moabitess;⁶ yet these women were not regarded as complete chattels, as were women in the preceding social stage.

The land also was not subject to private ownership. Property could not be private when it was obtained by robbery. Tribes must hold together. Outward conflict compelled an inner unity, which made private property impossible. Wills were unknown, and the land belonged to the Lord, which led to the denunciation of woes upon the remover of ancient land marks. This led Naboth to say to Ahab: "The Lord forbid it me that I should give the inheritance of my fathers unto thee."⁷ Transfer was difficult

¹ *Exodus* 21: 7.² *Deuteronomy* 22: 29.³ *Exodus* 21: 2.⁴ *Genesis* 24: 53.⁵ *II Samuel* 16: 21.⁶ *Ruth* 4: 10.⁷ *I Kings* 21: 3.

and transient. Symbolic acts were necessary, as the giving of the shoe. There were, moreover, restraints on the enjoyment of the property, chief of which was the Levites' tithe. The owners were forbidden to reap the whole field;¹ while the rich were required to feast all their poor neighbors once a year.

The foundation of Indian social order also was the family. The law regarded the family as a corporation. The son and the daughter could be sold. Under the caste system, the asura was bound to serve the other classes and the slavery was less harsh than that of Rome.² As to land, after the passing of the early village community there remained family ownership, with an elaborate inheritance, with participation of the heirs rather than division. Property was the means of paying a man's funeral expenses. Inheriting the land was inheriting a family and funeral rites. "The right of pronouncing the prayers belongs to the son who came into the world first." "He ought therefore, to have all."³

After the legendary golden age of communism among the Greeks patriarchal ownership arose. Fustel de Coulanges says that every κληρος (lot) remained attached to the same family down to the revolution of Cleomenes, i. e., for eight centuries. This can scarcely be recognized as private property, one of the chief characteristics of which is assumed to be the right of disposition. Land was "the property not merely of a man but of a family, whose different members must be born and die here."⁴ It was universally prescribed that it might not be sold. Thus Solon punished the sale of land by fine and the loss of citizenship. Aristotle says that many cities forbade sales. Demosthenes got

¹ *Leviticus* 19: 9-10.

² Hunter, *Roman Law*, p. 49.

³ *Manu*, ix: 105-7.

⁴ Fustel de Coulanges, *Ancient City*, p. 63.

all of the patrimony as head of the family. Liberty of private property scarcely existed where entire classes not slaves were excluded from the soil as in Syracuse, Miletus and Samos where the Geomori owned the territory to the exclusion of the Demiurgi.¹ In Rome also the chief ownership of the family property was an office, rather than a mere kinship. This was scarcely a régime of private property when only the pater-familias could have any rights approaching private property. The family, not the individual, was sacred. The spirit of patriarchal property spoke in Plato's *Laws*.² The legislator says to the dying: "Thou art the master neither of thy property nor of thyself: thou and thy estate, all these things belong to thy family: that is to say to thy ancestors and to thy posterity."

In Egypt civilization seems to be found in a period passing out of complete family ownership, of which there are survivals,³ into a caste ownership—like its pyramids, long enduring, with a servile mass at the bottom. There could be no real private ownership in such a civilization, where property in land was mummified, divided among slaves, one-third to the priests, one-third to the royal family, one-third to the warriors; and the mass of the people could have no property at all where an artisan was "more miserable than a woman." In ancient Mexico there was a caste ownership like that of ancient Egypt. The land and the slaves were not salable. The soil was allotted in fiefs, and divided, one-third to the crown, one-third to the nobility and one-third to the temples and tribes, and handed down from age to age from father to son. No Aztec could call a foot of ground his own.⁴ In Peru the people were

¹ Fustel de Coulanges, *Ancient City*, p. 301.

² *Laws*, bk. xi.

³ Letourneau, *op. cit.*, p. 149.

⁴ Morgan, *Ancient Society*, p. 203.

divided into classes and sections, each with its chief. One-third of the land belonged to the sun, one-third to the Incas and one-third to the people, who tilled it all.

So from the Javanese *desa* and the Abyssynian family estate¹ to the Russian *mir* and the communal survivals in Switzerland, Scandinavia and the Orkneys are found evidences of the general prevalence of forms of property that must be called estate rather than private property. It is not characteristic of private property that custom regulate the allotments of land and the rotation of crops. No such liberty was wanted when the Germans were themselves in rotation and "*agriculturae minime student*," and wanted only oatmeal and game and security. When war was always imminent, unity, "integration," was more desirable than private property. Then they were "beerbten." Neither money, nor scarcity of land existed to make it worth while to rob them of their inheritance. They had not learned the word "Eigenthum."

If the foregoing conclusions be true, barbarian society everywhere passed through an alternation of private property and estate.

Barbarian estate faded into a more individualized ownership as the barbarian society gave place to national unity. "The agents of legal chance, Fictions, Equity and Legislation, are brought in turn to bear on the primeval institutions and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals."² The establishment of the Hebrew monarchy, with the subsequent development of national unity, such as appointment of judges by Jehosaphat, diminished

¹ Letourneau, *op. cit.*, p. 157.

² Maine, *Ancient Laws*, p. 162.

the power of the family head and loosened the family bond. Through the rapacity of kings and the plunder of neighbors, through the practice of interest and the consequent debt, through contact with Babylonian laws at the period of the captivity, the institution of private property was developed. Slaves became more numerous. "And lo, we bring into bondage our sons and our daughters to be servants, and some of our daughters are brought into bondage already: neither is it in our power to help it; for other men have our fields and our vineyards."¹ Isaiah cried out² "Woe unto them that join house unto house, that lay field unto field till there be no place, that ye may be placed alone in the midst of the earth." This was private property. How imperfect was the first civilized conception of private property is witnessed in stone by the Babylonians. Sini-Istar, son of Ilu-Arba, and Apil-ili, his brother, are found paying three and one-half silver minas to Minani, son of Migrat-Sin and Ilu-Itura, his son, for a garden and house next door. And Minani "will not act contrary to this agreement for distant days." Seven people witness this and it bears two seals. One of the witnesses must be a "servant of the God." And then Minani's right to reclaim the land remained as a part of the estate.³ Still transferable mortgages were known in Babylon,⁴ although they had no wills. Every kind of commercial paper circulated almost as freely as a bank note does to-day.⁵

Like the Hebrews, Mohammed said: "The earth is the Lord's," and like them also he considered himself the Lord's heir, and gave title deeds to the lands, thus breaking the patriarchal spirit of the Arabs. The Brahman says: "What-

¹ *Nehemiah* 5: 5.

² *Isaiah* 5: 8.

³ Lee, *Historical Jurisprudence*, p. 16.

⁴ *Ibid.*, pp. 20-30.

⁵ *Ibid.*, p. 32.

ever exists in the universe is all in effect, though not in form, the wealth of the Brahman, since the Brahman is entitled to it all by his primogeniture and eminence of birth."¹ The Brehon *bo aire*, the Greek chieftain, the Roman pater-familias are brothers to the Brahman. Individual desires are stronger than paternal duties. Advantage outweighs obligations. Individual desire is given freedom under the continuance of the same unifying forces that produced the larger social units of which these strong persons became the autocrats. That is, outward stress enforced union. Some necessity of expending social force in conflict brings the several units into a common nation. Then when unity has produced strength and social security, the individual obtains greater liberty within the established national guarantee. But as the individual property is less political in character, it is more expansive. Thus individualism supplants obligation.

The Brahman or Kshatrya might in times of distress, when he required money for sacred purposes, lend to a "very sinful man" at a small interest.² Private property was early conceived by the Hindoos. The liberality of their early law to women indicates a change from family to individual property. The Chinese house of Tsin (254 B. C.) instituted private property,³ which rich men soon monopolized. This ultimately made feudalism necessary, as it did in Europe.⁴ Slavery was complete; but since the land holdings were small, slaves were not numerous. With the Mexican advance from communism, many were driven to sell themselves and their children. So great progress was made in personal appropriation, indeed, that it is said that Mexicans ate ten thousand Mexicans a year. The

¹ *Manu*, i, 96.

² *Ibid.*, xi, 7.

³ Letourneau, *op. cit.*, p. 160.

⁴ *Ibid.*, *op. cit.*, p. 160.

old Brehon *bo aire* destroyed the family communism of early Ireland by rendering the chief's share hereditary, by attaching broken men to himself, by loaning them part of his herds; and when, through the increase of population, the land became valuable, he took that too.

Greece passed insensibly from the patriarchal stage to a landed aristocracy and insensibly private property prevailed. The sanctity of ownership was defiled by money and trade and by Aristotle's *τόκος*, the unnatural gain from money, rather than from service. When a loan was raised on a mortgage, a notice pillar bearing the creditor's name was placed by the mortgaged house. The country was studded with mortgage pillars,¹ defying the gods Termini. Solon tried to correct the increasing inequality, by forbidding the pledging of persons or wives or children, by reducing debts, by debasing money, by persuading the rich to forgive debts, by dishonoring sales of land, by forbidding women to bring their husbands more than three robes and a little furniture, by encouraging marriage to be for love and not for money.² A wealthy man might not live in a community without rendering it services. A wealthy citizen was compelled to take an office to which a poorer was elected or else change estates with him.³ So the trierarch, choragus, gymnasiarch, were rich men. But in spite of all these restrictions Solon recognized wills, by allowing the childless man to choose an heir. Plutarch says Solon by this first made the estate of a man truly his own. This led to greater inequality than ever. Inequality was further increased by Solon's distribution of political privilege according to property, and by Cleisthenes' territorial division. Moreover, Solon had helped rather than hindered the development of

¹ Letourneau, *op. cit.*, p. 241.

² *Ibid.*, p. 241.

³ *Ibid.*, p. 253.

private property by uprooting the legions of gods Termini. Thus the aristocrats of the old order no longer had a monopoly of the gods, nor their estates the protection of superstition. The Greeks made themselves some democratic gods. Pisistratus supplanted the gods of the fathers with Hermes, the god of commerce and of theft. Solon lamented the growing spirit of private property.¹ "The ambition of the rich knows no bounds; the most wealthy wish to grow yet more so. Who may be able to assuage the insatiable greed. They respect neither sacred property nor public treasure." Anacreon says:²

"Love cares no jot for birth,
And of wisdom he makes mirth.
He only looks for gold.
A thousand plagues befall
Who first was money's thrall
In better days of old.
He robs us of our brothers
And our fathers and our mothers.
The world with blood he covers.
But oh! far worse than all,
He's the death of us poor lovers!"

Private property was inevitably concentrated in a few hands, the commercial class getting the money and the nobles the land.³ When estate as a political division is superseded by private property, patriotism, the communal sense, is superseded by avarice or individualism. The aristocrats in the interest of their property, welcomed the Macedonian and the Roman invaders. Aristotle proposed the only possible remedy, a redivision of land.⁴

In Rome absolute, inalienable ownership by one member

¹ Quoted in Letourneau, *op. cit.*, p. 247.

² *Ibid.*, p. 247.

³ Lee, *op. cit.*, p. 165.

⁴ Laveleye, *Primitive Property*, p. 161.

of a family, which usually and inexactly is called "private property," slowly became more nearly private property, that is, a right obtainable by other individuals than those entitled to the headship of a family by birth. "The idea of a testamentary disposition of property, which, but for the plain teaching of history, we should consider of the very essence of ownership, was reached by slow and tortuous steps."¹ The early rules of inheritance, first through children, then through agnates, or descendents through males, excluding the children of daughters, were modified by increasing ease of adoption, which increased both the owner's power of disposition and the possibility of obtaining ownership. The Twelve Tables (450 B. C.) gave the right of naming heirs to heads of families who had no children. This parallels the action of Solon in Greece. Under the praetorian edicts, a form of law reflecting social development, the office of the heir was changed from that of the responsible successor to the familia, or aggregate property under the *patria potestas*, to mere executor. The right of inheritance was transferred from agnates to blood relations. Freedom of transfer was increased at the same time. *Mancipatio*, an elaborate fictitious delivery of *res Mancipi*, was employed in early transfers, requiring from five to seven witnesses. This quiritarian ownership gave way gradually to the simpler form of *usucapio*, or bonitarian ownership, which had been rendered necessary in ordinary transfers by the necessities of an increasing population. Justinian said:² "Nothing is so agreeable to natural fairness as that the wish of the owner, who desires to transfer to another that which is his own shall be respected;" and he preferred the prevailing simple form of *traditio* in trans-

¹ Hunter, *Introduction to Roman Law*, p. 148.

² *Institutes*, II, 1: 40.

fers. The history of Roman property is the history of the assimilation of landed to movable property.¹

During the Empire, sons, who under the old *patria potestas* could own no property, were first allowed property acquired in military service and later that acquired in civil service. Later the right of property was conceded even to women, and legacy and dowry hunters became a familiar phenomenon. The growth of commerce and usury aided in the freeing of ownership. Interest is a great force in moving property. As in India and Greece, it was made higher by attempted suppression. Cato was a usurer. Horace² tells us that twelve per cent was honest, sixty per cent was usurious. The nobility issued loans in the names of aliens.³ As among the Greeks and the Hebrews, the decay of ancestral religion and the neglect of the *sacra* aided in making property private.

With liberty to own land privately, liberty to own men privately also increased. Everywhere men were changed from individuals in the household of the patriarch to items in his inventory of live stock. As the personality of the few was elevated, the personality of the many was depressed. Debtors had been subject to arrest by their creditors. The Twelve Tables provided that "after the third market day they (the creditors) may divide him in pieces among themselves; if they shall have cut more or less, let it not be charged against them." But in later periods there was a greater differentiation of individuals from estates, and accordingly of the status of women and children, and even of debtors, from that of slaves. Whatever may have been the status of all these people at various periods, the

¹ Duke of Argyll, *Unseen Foundations of Society*, p. 136.

² Quoted in Letourneau, *op. cit.*, p. 387.

³ R. H. Inglis-Palgrave, *Dictionary of Political Economy*, vol. ii, p. 430.

ownership of slaves was sharpened by the legal developments which led to greater freedom of these higher sorts of subject personalities, such as the practical abolition of *patria potestas*, of *manus* and of *confarreatio*, the ancient forms of marriage. There was still a vast and increasing number of chattel slaves, who were so cheap that they might be fed to the fishes. They cost but four drachmas.¹ Cato the elder, sold his old slaves. Their legal status was "pronullis, pro mortis, pro quadrupedibus." Masters were compelled neither to clothe nor to feed, and could put them to any use or shame. Varro called a slave *instrumenti genus vocale*. Trimalchion, asking how many infant slaves were born yesterday on his estate, was told that there were born thirty boys and forty girls.² The Christian church did not maintain the validity of slave nuptials nor protect the female slave. "Servants be subject to your masters with all fear, not only to the good and gentle, but also to the froward."³ As in all countries where slavery prevails the line between freedom and slavery was readily crossed. Thus in the golden age of *dominium*, Virgil owned Celestes, a poet, and Alexis, a grammarian. Mæcenæ owned librarians, readers, musicians, fools, dancers, tasters, hair extractors, and many other sorts of artists. Torturers and whips were kept even by the Roman matrons, for their tiring ladies, who might be tortured for the entertainment of visitors.⁴ The doom of St. Agnes was: "Insanus iudex jus sit eam expoliari, et nudam ad lupanar duci, sub voce, praeconis dicentis, Agnem sacrilegium virginem Diis blasphemiam inferentem scortum lupanaribus datur."⁵

¹ Letourneau, *op. cit.*, p. 272.

² Brownlow, *Slavery and Serfdom in Europe*, p. 5.

³ *I Peter* ii: 18.

⁴ Blair, *Slavery amongst the Romans*, p. 259.

⁵ *Ibid.*, p. 222.

As in Judea and Greece, individual advantage meant concentration of property. This concentration was met by repeated efforts to secure greater equality through the distribution of public lands, to the plebeians. Thus in the fourth century B. C. the tribune brought forward twenty-eight bills to obtain assignments of lands in favor of the plebeians. The Licinian laws sought to check inequality and the confiscation of the commons by the patricians by forbidding any one to possess more than five hundred jugera of public land or to have more than five hundred sheep; and by compelling every owner to support a certain number of free men. After the first Punic war a distribution was sought to relieve the misery of the plebs who, owing to the natural tendency of large estates to absorb small estates, had lost all their property. Tiberius Gracchus said (133 B. C.): "The poor folk go forth to war to fight and die for the delights, risks and superfluities of others, and they are falsely called lords and rulers of the habitable world in that land where they have not so much as a single inch that they may call their own."¹ He reproduced the Licinian law. But *latifundia* was stronger than the tribunes, as it always is in every country. "Latifundia perdidere Italiam." After the Gracchi were got rid of, agrarian laws favorable to large properties were secured at the close of the second century B. C. and the shares were allowed to be sold, the smaller ones of course being absorbed.

Anciently the third form of ownership, or the ownership through representatives of things, was not so important as in modern times. A man's ownership was not so often symbolized otherwise than in material possessions. Maine² traces the idea of corporate unity to the ancient clan and tribe life. During the ages when ownership in the family

¹ Letourneau, *op. cit.*, p. 270.

² *Ancient Law*, p. 183.

was the only form of economic security, when there was little private property of any sort, ownership of corporate privilege was of course not differentiated from ownership of land. When private ownership with less obligation was taking the place of the bonds of kinship, associative ownership developed among those who were shut out from the land. Thus the first organizations now usually referred to as corporations were among the artisans and even perhaps among the slaves. The Grecian *heteroi* for religious rights arose through the exclusion of the artisans from the Eleusinian mysteries.¹ There were guilds under the Roman kings with halls, courts and religious rites.² Some of these guilds were brotherhoods of those unattached to families, organized in order that they might secure an artificial family strong enough to stand against the family organization of society. Hence they embraced, as again in medieval times, all the interests of their members. These guilds assimilated to the form of a family. The Roman society was given a *corpus*, as the *familia* was given a *persona*, a perpetual association. But when in the distribution of goods the individual gained at the expense of the family, when private property was developing in land and in slaves, in these guilds also the economic efficiency of corporations overshadowed their religious and social efficiency. The organization, once "joint in food, worship and estate," remained in an era of private property as a business corporation divested of obligation, composed of a body of owners of economic advantages for their several interests. Much business fell into the hands of the united artisans at first because the pater-familias despised business, through leaving it to the slaves of his household. But gentlemen, however little they love work, love profits,

¹ Ward, *Ancient Lowly*, p. 87.

² Maine, *Early History of Institutions*, p. 232.

and although senators were forbidden by law to engage in the degrading pursuit of trade, they did it by proxy. The power of these corporations was apparently unrestrained, in the manner of their incorporation, in the amount of their assets and in their internal management.¹ The increasing power of the corporations caused efforts to abolish them. Caesar restricted them to a few purposes under a special charter. And in order to prevent a man from getting too rich and so getting too much political power, he was restrained from having shares in more than one company. But greater freedom again prevailed,² and private corporations are found in all Roman cities.

Thus gradually all Roman property became free—to the strong.

Among the Teutons also, it is probable that family ownership had given way to the beginnings of private property before the rise of feudalism, through the encroachment of the lords on the rights of the commons. Fustel has perhaps demonstrated the existence of private property among the Germans in the early middle ages.³ Of the English bookland, which was land held by grant of the king and his council, absolute ownership in severalty was the rule before the conquest.⁴ This bookland was alienable *inter vivos*, and devisable by will.⁵ Slaves also were more completely owned. "The evidence seems to show that serfdom was much more of a personal bondage and less involved with the occupation of particular land before the Norman conquest than after, in short, that it approached the slavery of Roman law."⁶

¹ Baldwin, *Modern Political Institutions*, p. 146.

² *Ibid.*, p. 152.

³ *Origin of Property in Land*.

⁴ Taswell-Langmead, *Constitutional History of England*, p. 11.

⁵ Holmes, *The Common Law*, p. 358.

⁶ Pollock and Maitland, *op. cit.*, i, p. 13.

CHAPTER IV

OWNERSHIP IN ENGLAND

PRIVATE property at Rome was at its height during the internal disintegration, or economic individualism, which followed imperial unity and strength. When this disintegration had become political, the pressure of outward foes had no longer power to effect again the unity of the empire. With political disintegration, ownership could no longer be private. Roman individual ownership lost in distinctness with the decay of its national guarantee. There was an economic internal integration into larger social units. *Dominium* passed slowly into estate. Although slavery never entirely passed away and strong men always commanded the soil, there was less both of slavery and of the unconditioned ownership of land. *Dominium utile* diminished *dominium directum*.

Private property in men had, indeed, been slowly restricted before the final disintegration of the empire. The concentration of ownership and the decrease of the value of men, because of too great supply and because of the loss of the Roman world market, changed the inferior class from personal chattels to incumbrances or fixtures on the land, a sort of real estate. Men were now less attached to masters and more to land—a gain in liberty. Thus the Lex Cornelia (81 B. C.) made it murder for any one but an owner to kill a slave. Claudius made it a crime for even an owner to do it. Antoninus Pius decreed that masters ill using their slaves must sell them. Manumission

was for a long time unhindered and slaves were allowed to have *peculia* with the master's permission. Manumission had been imperfect. The freedman was usually bound to support his patron if the patron became poor. He was bound to do a certain amount of work for his patron and in case the freedman had no heirs, he must leave part of his property to his patron. Lex Junia Norbana (19 A. D.) gave complete rights to the imperfectly manumitted. Justinian enacted that when a master desired to free a slave, whether the old forms were observed or not, the slave became a citizen. He also repealed Lex Furia Caninia, which had prohibited the freeing by will of more than a certain proportion of the slaves.¹ Gratian (380 A. D.) freed the children of public actors from the necessity of following their parents' profession. Arcadius (385 A. D.) prohibited the sale of slave girls as musicians or dancers. Theodosius forbade owners of theaters to have Christian slaves.² Valentinian in the fourth century forbade the sale of servants without the land. So the slave became a *colonus* and held a *benefice*, even though he must periodically kiss the manor-house lock or do some more menial service for it. The canons of the councils aided in the manumission of slaves in the fourth and fifth centuries. It was in these days that Saint Melanie freed in one day eight thousand slaves and Saint Pelagia, a penitent actress of Antioch, gave money and jewels and freedom to her slaves. And slaves could be priests.

After the sixth century rural slavery was entirely supplanted by the *colonatus*, or serfdom attached to the land. The natural concentration of private property had also depressed the free peasantry into this *colonatus*. The *emphyteuta* was a frontier tenant by military service, first of

¹ Hunter, *op. cit.*, p. 25.

² Brownlow, *op. cit.*, p. 46.

the state, then of the private owners. In the prevailing insecurity the small owner commended himself and his land to his strong neighbor, who often forcibly assisted in the commendation. The barbarians probably did not know the difference between a *colonus* and an *emphyteuta* in their treatment of the conquered. They settled their own *comitatus*, or military "companions," on the land in much the same fashion, and settlement under a lord is a less free estate than fighting under him. Allegiance is transformed into an institution, which readily blended with the *colonus* and with the *commendatio* which were so much like it. So *emphyteuta*, *colonus*, and *comes*, under various names and tenures became the vassals of feudal lords in feudalism, a great but never uniform system of "co-operation for mutual defense."

It is not possible to measure the influence of the Christian doctrine of responsibility, and hence of the Christian doctrine of price and the condemnation of gain at the expense of others, in the substitution of medieval social interdependence for Roman liberty and subjection. It probably was not great. But the church, as guardian of the weak and beneficiary of their toils, made serfs of them rather than freemen, and aided in the rapid extension of feudalism through being preferred, as a master, to the secular lords.

It is significant that to modern institutions the idea of freedom was contributed by those nations which were at the time of the coalescence of the north and the south perhaps growing out of a patriarchal and communal into an individual economic organization, while the idea of law and gradation was contributed by those nations which had exhausted the capabilities of ancient individualism.

Whatever Anglo-Saxon private property there may have been in England was early absorbed in the manor. This was developing doubtless from barbarian times. The Ro-

mans probably made *coloni* of the Britons.¹ Though slavery did exist and bookland was almost private property, there was not the clear distinction between free and slave that prevailed among the Romans. The status of men and of land is inseparable. "Feudalism is the complete association of territorial with personal dependence and of both with definite rights and duties of jurisdiction."² Settlement on the land degraded the relation of *princeps* and *comites*. In the time of Tacitus³ it was a disgrace for a chief to be surpassed in valor, but property took the place of valor; the *gesiths* or companions of the king became his servants, or *thegns*; thegnhood attached to five hides of land, and replaced the earldom of blood. *Alods* were surrendered to the king to be received back as benefices. The township became the manor. The *Witenagemot*, or council, replaced the *folk moot*. In the tenth century the landless man was dealt with as a robber.⁴ Tenancy and dependency were assimilated to each other before the conquest. The right of devising by will ceased at the conquest.⁵ The *feodum* was a heritable, not a devisable right.⁶ The right of transfer *inter vivos* was limited by restrictions in favor of the heir.⁷ Property was an appendage of rank in a descending scale of subordination. The maintenance of orderly gradation, not of liberty, was essential to social welfare. "The successive claims of king, lord, tenant became established and the law speaks subsequently not of property in land, but of estate."⁸

¹ Brodrick, *English Land and Landlords*, p. 3.

² Pollock, *The Land Laws*, p. 30.

³ *Germania*, 13: 114.

⁴ Pollock, *Land Laws*, p. 31.

⁵ Digby, *The Law of Real Property*, p. 29.

⁶ Pollock and Maitland, *History of English Law*, i, 44.

⁷ Taswell-Langmead, *Constitutional History*, p. 51.

⁸ Digby, *op. cit.*, p. 61.

The villein was at the mercy of his lord in all but life and limb. He could be brought back if he left his manor. He must labor on the lord's demesne two or four days a week and besides on "boon days," or harvest days. The regime of private property as now understood cannot be said to have existed when it was conceived that the poor could confer boons on the rich. Rents were exacted. Thus "Walter Johan holds from the lord in villenage one messuage and ten acres of land by paying thrice yearly at the festival of the Blessed Mary of Hunthield 4s. 5½d. and at Easter 20½d. and at the feast of St. Michael 20½d. and at the feast of Christmas a hen and a half, the hen being of the price of 1½d." ¹ Although the free tenants, *libere homines*, had superior rights, there were recorded in the Domesday Survey only 4% of the population as *libere homines*; while the services of freemen differed from those of villeins apparently only in the amount and the certainty of work. Every tenant, whether he was a tenant by knight service, holding his land by kiss of his master and by oath of fealty, or a socage tenant giving services or goods, or a villein holding by mean services, was robbed in various conventional ways by his lord. The lord had a right to fine the tenant for alienation of his land; to the escheat of land without an heir. For the knighting of his son or the marriage of his daughter or for his own ransom he might exact the cost from his tenants. He had a right to "primer seisin," one year's profits from the tenant's heir. The lord controlled the marriage of the tenant's daughters, later also of his sons. This oppression was aided by the lord's political headship of the community. He was head of the court baron, with the civil jurisdiction of the manor, and

¹ Ashley, "Villein Tenure," in *Annals of the American Academy*, i, p. 412-25.

of the court leet, with criminal jurisdiction. "Whenever the lord has a doubt concerning the heir of the tenants, whether or not he be the rightful heir, he may hold the land until the matter be established according to law."¹ But even the villain had some privileges, which lessened the lord's right in the estate to some degree. Thus on fixed days he drank scotale with the lord—at his own expense.² He received some annual favors from the lord. Thus the swineherd of Glastonbury Abbey received one suckling pig a year, the interior parts of the best pig, and the tails of all the other pigs slaughtered in the abbey.³ But there were substantial rights. Thus the lord could not remove the tenant as long as he rendered the service due.⁴ The serf who would have been in former times a slave, now might get "seisin of liberty," when the lord could not recover him without a writ; he might defend himself in a king's court.⁵ He might serve as presentor or juror in courts.⁶ The same person was treated by the law now as a free person, now as a slave or chattel. The laws of William the Conqueror provided: "Those who cultivate the land ought not to be harassed beyond their proper fixed amount; nor is it lawful for the lords to remove the cultivators from the land so long as they are able to render the due service." The lord could not alienate in perpetuity any part of the inheritance of his tenant.⁷ The lord was bound to warrant his man, who did him homage, against

¹ Digby, *op. cit.*, p. 91.

² Vinogradoff, *Villeinage in England*, p. 164.

³ Cheyney, "Recent Tendencies in Land Tenure," in *Annals Amer. Acad.*, Sept., 1891.

⁴ Pollock and Maitland, *op. cit.*, i, p. 215.

⁵ *Ibid.*, i, p. 401.

⁶ *Ibid.*, i, p. 404.

⁷ Digby, *op. cit.*, p. 88.

all men "that can live or die." The lord was liable for his men's good conduct.¹ Aids were fixed at 2s. for each 20s. of rental value; and reliefs at 100s. by Henry I. and by Magna Charta at £100 for a barony and 100s. for a knight's fee.

Thus ownership was an equilibrium. The position of the villein was one of precarious, but real ownership. "The grinding and hopeless poverty just above the verge of actual starvation so often prevalent in the present time did not belong to medieval life."² The stronger lords were indeed more powerful than they might have been with private property. But the attachment of political power directly to ownership weakens the tenure of ownership. Although feudal incidents were made a system of extortion, by William Rufus (1087-1100), although under Stephen the feudal nobles became tyrants in their fortified castles, their very power was their weakness. They did not have the modern state-supported property.

As ownership was feudalized, corporations were modified in form. The free Roman corporations had become distrusted on account of their political character, then utilized as state instrumentalities to supply the public needs, and were strictly limited in their powers. Members of corporations which were necessary for public interests were compelled to remain in them; their property was subject to implied hypothecation for its debts.³ Their children were compelled to succeed them. Private business was a public trust. Certain corporations, originally private, were compelled to supply grain and bake bread as a public duty. The individual was merged and the "college" was re-

¹ Holmes, *op. cit.*, pp. 19-28.

² Gibbins, *Industry in England*, p. 177.

³ Baldwin, *Modern Political Institutions*, p. 157.

sponsible for his debts and his crimes. The corporations of Rome, both private and public, disappeared perhaps in feudalism; perhaps in some cases existed continuously throughout that period, becoming guilds.

The manors, the churches and the towns of feudalism were a network of associative ownership. The manor was itself a quasi-corporation, since all its members shared in the land; all the tenants of the land were regarded as one, as a fictitious personality, by the lord when he amerced it for damage or for waste.¹ The community was liable for the collection of duties. Estates were sometimes let to real communities. But the manors did not constitute corporations in the modern sense, since the liability was one jointly and severally.² When ownership was universally associative; when a religious association offered to its members greater security than that under individual masters, and was able to acquire material goods by spiritual labors, it is not surprising that the religious houses engrossed a large proportion of the land in time. But membership in these corporations of "God and the saints" gave neither rights of possession nor of disposition, only of use, and the number of the saints was kept limited to the capacity of the land and the peasantry for supporting ease. In the eleventh century incorporation was extended to religious fraternities outside of the church, such as the Poor Soldiers of the Temple of Solomon, later the Knights Templars.³ The towns, like the manors, were responsible for a lump toll to the king in return for their charters, by which they had privileged tenures. This body of privileges and properties grew in the thirteenth and the four-

¹ Vinogradoff, *Villeinage in England*, p. 356.

² Pollock and Maitland, *op. cit.*, vol. i, p. 615.

³ Baldwin, *op. cit.*, p. 160.

teenth centuries into the conception of a corporation like that of the churches. But individual initiative was limited in these corporations. Thus the markets of the towns were sometimes granted to the burgesses or to a neighboring knight or abbey, to whom the buyers and sellers must pay toll for booths, for weighing and the like. The non-payment of a merchant of one town by a merchant of another town made any fellow townsman of the latter liable to seizure. This inter-municipal reprisal caused closer organization into the merchant guilds, a privileged class within the borough and finally ruling it. The earlier voluntary guilds, descended from the *frithborh*, or neighborhood association for protection, once independent of the government of the town slowly absorbed the town government. Association through similarity of occupations produced within the towns craft guilds, with power to govern their trades, such as the goldsmiths (1327), the mercers (1373), the haberdashers (1401). But membership in the guilds under which trade in the towns must be exercised was little like modern corporate ownership. There was no freedom of possession of gild privileges, for admission was jealously guarded; their object was monopoly. Nor was there freedom of use, "for every one who is of the gild merchant may share in all the merchandise which another gildman shall buy." Each member traded independently under the rules. Religious, municipal and social duties were charged upon them. And the medieval lawyer distinguished between these aggregates, which were like corporations, and the *persona ficta*, or created corporation.¹ Freedom of ownership was not practicable in times of civil commotion, when there was no national guarantee of security.

Political unification precedes economic and individual lib-

¹ Pollock and Maitland, *op. cit.*, vol. i, p. 474.

erty. Speaking after Spencer, the "integration" of feudalism precedes the "disintegration" of modern private property. Unity is the transition between two periods of liberty. Before a form of private property can be developed, there must be a central power to guarantee its security. The guarantee of the central government towards any class under its jurisdiction tends to uniformity. Uniformity of social forms is essential to social sanction. The lord of one estate, who holds dependents under one set of conditions, is outraged at the oppression of servants held under another set of conditions. The social integration into feudal units was the first stage of the integration of the political unity which accompanied and conditioned the slow growth of modern private property.

Liberty to own men as things never became so marked in England as in Rome. Although feudalism as an institution for the subjection of men made outright slavery in England unnecessary, slavery existed wherever it was desirable property. The traces of an early slavery seem again to indicate the prevalence of some approach to private property in England before feudalism. When St. Patrick set about christianizing the Brehon law in 430 A. D., Fergus, son of Leide, king of Uladh, was receiving twenty-one "cumhals," female slaves, as compensation for the killing of Echaidh Belbundhe, a criminal under his protection.¹ The Welsh penalty for cutting off a thumb was "half a bond maid." To draw blood from an abbot cost seven pounds and a female of the criminal's family to be a washerwoman."² In England John bought Gunilda from Goda for half a pound of silver and gave her to the church of St. Peter. Wilfric bought Elfgitha for half a pound. Egilsig bought Cynric for an eyre of gold. The mother of

¹ Brownlow, *op. cit.*, p. 120.

² *Ibid.*, p. 131.

Earl Godwin sold beautiful girls to Denmark.¹ The Bristol merchants sold slaves.² In the eleventh century English nobles were breeding slaves for the market. 25000 servi, 9 per cent of the registered population, were recorded in the Domesday Survey. Under the progressive degradation inherent in a servile position and under the instinct of lawyers for legal precision and the influence of the Roman law, villein tenures came to resemble real slavery. The term villein was assimilated to the lower term *servi*.³ Glanvill said that the *nativi* were so destitute of any kind of property that they were legally incapable of purchasing their own redemption from villeinage.⁴ 'After the decline of feudalism the population was so great that the transition from slavery to the wage system could be bridged over without much slavery. Upon the scarcity of men following the Black Plague (1348), when laborers demanded "fresh flesh or fish fried or baked and that hot or hotter for chilling of their maw" ⁵ they were met with the atrocities of the statutes of laborers from 1349 to 1444 and later by the apprentice laws, which might be treated as a rudimentary appearance of that stage of complete ownership which had been necessary to complete private property in other countries. By one of these statutes "if any person refused to labor and lived idly three days" he was to be branded with a red hot iron on the breast "V," and adjudged the slave of the informer for two years. He was to be fed bread and water and refuse meat. He might be beaten and chained. If he absconded he was to be a slave for life. If a second

¹ Brownlow, *op. cit.*, p. III.

² Pollock and Maitland, *op. cit.*, vol. i, p. 12.

³ Taswell-Langmead, *Constitutional History*, p. 247.

⁴ Taswell-Langmead, *op. cit.*, p. 247.

⁵ Langland, quoted in Brodrick, *English Land*, p. 17.

time, he was considered worthless as property and put to death.¹ In the sixteenth century beggars might be condemned to slavery and much later a vagrant might be whipped "till his body be bloody by reason of such whipping." By the time of Elizabeth the practice of binding out children as apprentices was extended to agricultural laborers. The journeyman in the gild no longer had a prospect of mastership. If he asked for higher wages he might be sent to the house of correction.² But real chattel slavery prevailed wherever the English needed it, or could profit by the trade in slaves. Cromwell sold thousands of Irish to the Barbadoes. Many women were sold as prostitutes to the West Indies.³ A Spanish gentleman was sold openly in chains in the Dover market. Three daughters of the governor of Limerick were sold to the Indies.² A young English sailor was saved from the Indians by pretty Yarna, a Barbadoes girl who hid him, fed him, loved him. He sold her for a slave. In 1713 England secured the sole right to sell slaves into the Spanish colonies. In 1771 one hundred and ninety-two ships of Liverpool, London, Bristol and Lancaster carried 47,146 slaves from Africa to the colonies. In 1800 there were 45,000 slaves in the English West Indies.⁴ The annual average of exports from 1680 to 1786 was twenty thousand.⁵

The modern "tripods of Hephaestus," — the spinning jenny, the mule, the loom, — instead of serving as allies to human hands, speedily became masters of "hands." The undemocratic idea prevailed—*laissez-faire*,

¹ Wade, *History of the Middle and Working Classes*, p. 47.

² *Ibid.*, p. 17.

³ Brodrick, *English Lands and Landlords*, p. 179.

⁴ *Ibid.*, pp. 186-8.

⁵ Cunningham, *English Industry and Commerce*, p. 316.

let me do as I please, "me" being a man with a hundred hands, which speedily became a thousand. The use of men, women and children by factory owners at the beginning of the nineteenth century had all of the advantages and none of the disadvantages of slave ownership. Starvation brought the wives and daughters of the workmen to the factories and since only their labor and not their strength had to be bought, there was no waste in wearing them out. Half naked women were harnessed to draw carts in the mines through passages two feet seven inches high; children of seven worked twelve to fourteen hours a day in factories. There were regular traffickers in the children of paupers. "In stench, in heated rooms, amidst the constant whirling of a thousand wheels, little fingers and little feet were kept in constant action, forced into unnatural activity by blows from the heavy hands and feet of the merciless overlooker and the infliction of bodily pain by instruments of punishment, invented by the sharpened ingenuity of insatiable selfishness."¹ They were fed the same food that the master gave his pigs. Irons were riveted to the ankles and chained to the hips of girls and women to keep them from running away. Girls were chained to be beaten with thongs. The suicides, the murdered and the tired were buried secretly. No such cruelty was ever widespread under slavery. It would not pay.

It would be impossible to assign any definite beginning to private property in land, since the thing probably was always in more or less extended existence. It may here be traced back to the conquest, within the period of the height of feudalism. "Before the conquest there was no more one and the same law for every piece of land than there was

¹ Gibbins, *op. cit.*, p. 389.

one and the same law for every man.”¹ But the forms of subordination had become so nearly uniform that the unity effected by William the Conqueror was rather acceleration of existing tendency than an economic revolution. Centralization had proceeded from mark to a union of marks, a *pagus* or *gau*, then to aggregations of smaller divisions, from hundreds to shires, to kingdoms, to heptarchy. Before land ownership could be free, the old ownership of law must be brought under government, even though government is still personal. When William exacted from the sixty thousand land-owners at Salisbury Plain (1086) direct and universal oath to himself above feudal obligations, “feudalism was doomed.” There was then appeal from the lords. This political subordination was aided by the confiscation of the former bookland and its conversion into feudal grants to favorites. William took over the Saxon king’s private lands and his suzerainty without discrimination. Moreover he confiscated 1400 manors and more after each disaffection. “The folkland was all treated as *terra regis*.”² And the tenancy on it continued as copyhold, a form of tenure under which much land continued to be held down to the nineteenth century.

The reign of Henry II was marked by centralization of government and subjection of ownership to national power. By the constitutions of Clarendon the government secured jurisdiction over the church and the custody of the revenues of vacancies. The Assize of *Novel Disseizin* was instituted. If a person was disseized of land wrongfully, he was to have a remedy by royal writ and a jury. The Assize of Northampton (1176) originated the action *mort d’ancestor*, by which the heir of a tenant could prevent the lord or

¹ Pollock, *Land Laws*, p. 26.

² *Ibid.*, p. 37.

any other interloper from seizing his tenement. The heir was entitled to obtain possession against every other person. A better claim to ownership could no longer be asserted by "self help," but required an action. The defendant was often the lord who had seized lands on pretext of making good some seignorial claim. Since jurisdiction now belonged to the king's court the tenant was no longer bound to answer in the court of his lord concerning his freehold without the king's writ.¹ By this jurisdiction and by the institution of the jury's inquest into local affairs, diversity of local custom was broken up. The ancient allodial and the feudal military systems were replaced by a national armament under Henry III and Edward I,² while a tax, "scutage," was allowed in lieu of military service. Concurrently with the development of the militia the ancient police organization was expanded, and all men were sworn to keep the king's peace (1195).³ All men were thus made part of the national unity. Although feudalism is said to have been most perfect in the first half of the thirteenth century, this very perfection, Bracton's "fairly complete system of customary land tenures," was the unity necessarily preceding further liberty of individuals. Magna Charta confirmed the legal status of individuals rather than of estates. "No free man shall be taken or imprisoned or disseized or outlawed or exiled or anyways destroyed; nor will we go upon him nor will we send upon him, unless by the lawful judgment of his peers or by the law of the land."⁴ Political unity and civil rights were further secured by the admission of the burgesses to Parliament (1264), by the gradual establishment of

¹ Digby, *op. cit.*, p. 71.

² Taswell-Langmead, *op. cit.*, p. 155.

³ *Ibid.*, p. 157.

⁴ C. 39.

the parliamentary power and by the abolition of the licenses and franchises such as the "liberties" or freedom from taxes, services, forest laws and jurisdictional privileges.

Bracton regarded the tenant, although under a *dominus capitalis*, as himself a *dominus verus*. The lord might then be a trespasser on his own land. The rise of the doctrine of estates in the latter half of the thirteenth century with a distinct gradation from estates in fee to estates for life indicates the substitution of legality for custom in the division of lands. Feudal incidents on freehold became perfunctory. Such services became common as for the knight to carry a sword, the socage tenant to deliver annually a rose or a peppercorn, or the tenant in petit serjeanty to give the king a lance yearly. The practice of "uses," by which an estate was conveyed from a real owner to a nominal owner, delivered the estate from various feudal incidents. The feoffee to uses had no estate, therefore he was not subject to feudal services.¹ In 1666 relief was granted to the *cestui que trust* whose trustee suffered escheat. The Statute of Uses, which made the beneficiary owner the legal owner, was directed against the practice of uses in the interest of landlords; but it was so interpreted as to preserve the custom.² Feudal incidents were formally abrogated in 1660. Freehold tenancy has since been regarded as equivalent to full ownership.

Confiscation changes to taxation as estate with political incidents changes to private property. The numerous instances of confiscation even in the later middle ages distinguish the ownership of that time from what is now known as private property. William's wholesale confiscation was necessary at a time when political organization

¹ Jenks, Edward, *Modern Land Law*, p. 131.

² Cf. *infra*, p. 63.

was not dissociated from the land. Illegal exactions of feudal lords and kings burden the annals of many years and doubtless must be regarded as a force in changing the form of ownership. William Rufus appropriated the revenues of vacant benefices. Under Richard I taxation was like robbery. One-fourth of all the goods in the realm was demanded for his ransom. Demesne lands were sold and then forcibly resumed. Edward seized the wool of the merchants.¹ During the reign of Edward III the right of parliament over taxation was established.² Edward IV and his successors collected "benevolences;" and Henry VIII was twice released from his debts by parliament. By the dilemma known as Morton's Fork a frugal person was asked for money because he must have saved much, and an extravagant person because he had much to spend.

The detachment of direct political character from land ownership, though not yet complete, has been advanced in our own time. The idea that borough representation in parliament was salable property was formally recognized by Pitt's proposed reforms of 1785, which set aside £1,000,000 to buy the consent of proprietors to disfranchisement. In recent times an election for York cost £150,000.³ The reform bills (1832-1884) diminished the political predominance of land ownership.

Before land can be private property hereditary tenantry must be detached from it. Unification of jurisdiction and uniformity of tenures, through the increase of legal procedure and the registration of tenures effected uniformity of dependency. The term villein came to be applied to all base tenures alike, whether held by a villein or a free

¹ Taswell-Langmead, *op. cit.*, p. 211.

² *Ibid.*, p. 226.

³ Taylor, *Constitutional History*, ii, p. 522.

man. A villein might have a freehold tenement or a free man a villein tenement.¹ One man might be a tenant by knight service, by serjeanty, by fee farm, by socage and by burgage. By making the parcel of land rather than the rank of its holder the basis of the tenant's relation, the tenant began to be detached from his status, and the land to be the subject of contract, hence of private property.

While superior tenants were gaining rights, legal protection was withdrawn from the inferior tenants. In the feudal theory the villein's holding was protected in the manorial court and by William's decree, the lord was bound to exercise his will according to custom. Rapacity increased burdens. The lord's interest became the custom. In the latter part of the thirteenth century many tenants sought to prove that their lords had broken the custom and imposed new burdens on them, upon "some sudden, fantastic humor" had expelled them and had left them without remedy. Religious houses never relaxed a gain. In 1280 the Abbot of Burton, because his villeins instituted suit against him in royal courts evicted them all and seized their cattle. They could get no remedy against the abbot, who said that, being villeins, nothing was their own but their bellies, whereupon by paying heavy fines and acknowledging themselves "serfs at the will of their lord" they were reinstated. Even in the fourteenth century when the decimation of the plague increased the value of the tenants, such tenure was held to be only of custom, not of law and evictions were common. Chaucer says "a cherl hath no temporal thing, that is ne his lord's as they say." Under feudal theory the lord had little power to eject a tenant, even for non-performance of his services.² But difficult

¹ Taswell-Langmead, *op. cit.*, p. 248.

² Pollock and Maitland, *op. cit.*, vol. i, p. 333.

and tedious actions before the king's courts were replaced by the rule that if the tenant allowed his services to fall into arrears for two years the lord might claim the land in demesne.¹ The right of distress also was exercised, the taking and holding of chattels until the tenant rendered dues.

A customary right in derogation of the homage and fealty due to lords was the alienation of tenant holdings. Magna Charta restrained the tenant's power of alienation.² The fief of that time was neither freely alienable nor absolutely inalienable.³ Much land had been alienated to the church by tenants. Since the church did not die or marry and gave only "orisons, prayers and masses for the soul of the grantor," the lord was deprived of his revenues. The *Statute of Mortmain* (1279) made all alienation to the church without the lord's consent illegal. In 1291 it was forbidden to alienate to any corporation. The *Statute de Donis Conditionalibus* (1285) denied the power of the tenant to alienate his holding to the prejudice of his lord, or of his issue. The ideas of the people and of the lawyers, who opposed this statute, favored fee simple. The *Statute Quia Emptores* (1290) gave a right to freemen to sell, but the purchaser should go directly under the lord and not under the lord's tenant as before. Previously the tenant had to reserve land enough to discharge feudal services to the lord. This statute enabled him both to transfer his land and to release himself from the lord.

Servile tenancy decreased through other causes. The Black Plague was a liberator. Savage laws against laborers did not restrain commutation of services for cash, which was more abundant from the thirteenth to the fifteenth cen-

¹ Pollock and Maitland, *op. cit.*, vol. i, p. 334.

² C. 39.

³ Pollock and Maitland, *op. cit.*, vol. i, p. 236.

ture. The possibility of getting money in the growing towns and the increasing trade lessened the mutual dependence of serf and master. The necessity of protection for the merchants was one cause of the Statutes of Westminster (1275-1285) for the order of the country and hence also for the extension of individual initiative and the ultimate freedom of ownership from the tyranny of manor and gild. Wat Tyler's rebellion was a turning point in the history of villeinage. While the tenants were escaping from the land, the lords were making the escape permanent. The Statute of Merton (XIVth century) permitted lords to enclose all of the commons but that which was necessary for the common use, and even that, if the tenant consented. This enclosure increased after the Plague and went on until there was nothing left to enclose. Utopia says "An covetous and insatiable cormorante may compass aboute and enclose many thousands of akers of ground together within one pale or hedge, the husbandmen be thrust oute of their owne or else either by coveyne and fraude or by violent oppression they be put besydes it or by wrongs and iniuries they be so wried that they be compelled to sell all." On account of the greater profit in sheep than in tenants in the sixteenth centuries there was a great increase of enclosures with a new conception of "proprietary rights" and a new series of peasant uprisings. "So now old fathers, poor widows and young children lie begging in the streets." In the thirty years from 1769-99¹ 2,500,000 acres were enclosed, from 1801 to 1845 general acts of enclosure were passed. Now there are many parks for wild animals, notwithstanding the population of the island.

But since land has no value to an idle owner without ten-

¹ Taswell-Langmead, *op. cit.*, p. 238.

ants, a new tenantry was developed to take the place of the old. In Bracton's time estates for a fixed term of years might be created by covenant, but it was personal property, the heir not taking the land as in the old tenantry. By the Statute of Frauds (1677) all land interests created by any process other than deed must be treated as tenancies at will only. This not only forestalled any new development of customary rights as an incumbrance on property, but destroyed numerous small freeholders who had no written proof of ownership. Accordingly at present tenancies at will are disfavored and tenancies by the year are the rule.¹ Courts of equity disfavor joint tenancy.² The courts have made the right of distress, or the seizure of tenant's goods, a more efficient instrument in the hands of the landlord.³ "The tendency of judicial interpretation has also been until lately to incline the scale of presumption in favor of the landlord on doubtful points."⁴ Another evidence of the detachment of the tenants from the land is the assessment of the rates on the owner instead of on the land as formerly.

The development of the liberty of land could not go on without confiscation of the property of the religious houses, which had traded masses for much of the kingdom. Henry VIII confiscated the monastic properties, distributing it to favorites. At the time of the reformation various continental nations had expropriated ecclesiastical property.⁵ After the Revolution the sovereign's expenditures were limited. The annual crown revenue was fixed at £1,200,000. The crown lands by the customary surrender

¹ Jenks, *Modern Land Law*, p. 89.

² Tiffany, *Real Property*, vol. i, p. 374.

³ Pollock, *Land Laws*, p. 142.

⁴ *Ibid.*, p. 150.

⁵ Taswell-Langmead, *op. cit.*, p. 36.

of the sovereign have again become folkland.¹ The sovereign has again been invested with the right of acquiring and disposing of private property as any other individual.²

While the landlord was becoming the land owner he was also getting power to dispose of his land. "It is not at all likely that before the Norman conquest custom had anywhere reached the point of letting the owner sell land without the consent of his family."³ Because land ownership was a political obligation and a family relation, it was not to be easily disposed of. It was less easy for the Norman baron to give his land to the church than it had been for the Anglo-Saxon thegn. To check the freedom of alienation by tenants in prejudice of the lord, about the year 1200 gifts limited to a man and his heirs of his body became common.⁴ But since the king's court favored free alienation,⁵ the lawyers defeated the limited gift by the interpretation, that as soon as the donee had an heir he had fulfilled the condition and could alienate. This right of limited gift was preserved in the act *de Donis Conditionalibus* (1285) which created the fees tail (cut-down fees) reserving heritability to a certain class of heirs. The land was made to "revert," come back to the donor at the end of a life estate or of a male descent, or to "remain" out to the donee's heirs—and "reversions" and "remainders" were invented which deferred the completeness and clearness of land ownership.

Each grantee was warranted in the possession by his grantor and indirectly by all the preceding grantors in turn. If the buyer was to have the warrant of the original grant

¹ Freeman, *Growth of the English Constitution*, p. 134.

² Taswell-Langmead, *op. cit.*, p. 592. ³ Pollock, *Land Laws*, p. 22.

⁴ Pollock and Maitland, *op. cit.*, vol. ii, p. 16.

⁵ *Ibid.*, vol. ii, p. 18.

"assigns" must be mentioned in the transfer to make it valid.¹ Hence a transfer required the warrantor's consent. The *Statute Quia Emptores* (1290) made the assign hold directly of the first grantor and hold the warranty of that grantor from the beginning. While this secured the lord's rights, as already seen,² it also made the land more readily transferable, assimilated it to property because the seller need not then secure the consent of the one from whom he bought and because the beneficial services were now conceived to be attached to the land rather than to the tenant.³ The lord could then exact services from any one who had the land while the tenant might do anything that did not injure the landlord.⁴ There were other barriers to alienation. By the apocryphal statute *Praerogativa Regis* fines were imposed on tenants in chief of the king for alienation without license.⁵ The *Statute of Mortmain* (1279) prevented excessive alienation to the church and tenancies in serjeanty were inalienable. The practice of "uses" evaded the Statute of Mortmain and was soon imitated in the transfers of other lands and prevailed in the time of Edward III.⁶ They aided insecurity and transferability of land by their capacity for fraud of creditors and lords, who lost reliefs, wardships, marriages, heriots, escheats and aids, while tenants lost their lands by ill advised confidence. These trusts were protected only by religious obligations until the jurisdiction of the chancellor in the time of Richard II began to protect the beneficiary owner. The Statute of Uses (1535)⁷ was evaded by limiting a use or trust upon a term of years. Since a term of

¹ Holmes, *op. cit.*, pp. 373-4.

² Cf. *supra*, p. 59.

³ Holmes, *op. cit.*, p. 388.

⁴ Pollock and Maitland, *op. cit.*, i, p. 325.

⁵ *Ibid.*, i, p. 329.

⁶ Digby, *op. cit.*, p. 318.

⁷ Cf. *supra*, p. 56.

years was not seizin, estate conveyed for a term of years to A for the use of B did not give B legal estate. Uses were also created by limiting to A to the use of B to the use of C, because the Statute executed only first uses, leaving the others to Equity (1551).¹ Again uses were created by limiting to trustees with active duties to perform, the statute being held not to apply to active trusts or express trusts. "Bargains and Sales" were made valid by which the legal owner entered into an agreement with a purchaser for the sale to him of his interest, the purchaser paying or promising to pay the money for the land. At common law a legal conveyance must be added, but in equity a "use" was raised in favor of the purchaser, the bargainer being only the legal owner.²

In addition to the ancient feoffment other methods of transfer arose. The "fine" ("final concords"), from 1179 on, was a compromise of a fictitious action, by which land was transferred and an elaborate record preserved in the treasury to prevent forgery. A "recovery" (1300) was an evasion of the statute of Mortmain, by which the religious men sued the tenant who by collusion defaulted.³ This legal process took the place of the forbidden gift. The same evasion might always be accomplished by license of the crown.

It became the settled practice to bar entails by the collusive suit, known as "recovery." The tenant in tail being in possession, a collusive person brought suit to recover a freehold as its true owner. The tenant did not defend the title, but "vouched to warranty" a third person from whom he professed to have title, who warranted it against all comers.⁴ This person disappeared in contempt of court

¹ Jenks, *op. cit.*, p. 128.

² Digby, *op. cit.*, p. 357.

³ *Ibid.*, p. 218.

⁴ *Cf. supra*, p. 63.

and hence his heirs were barred their reversion. The purchaser got the land by default, privately settling with the seller. This procedure was afterwards reduced to a fictitious record. The tenant in tail could go through all this performance, give a fee simple to another, have it reconveyed to himself and thus bar his own issue. A statute of Henry VIII made it possible to do the same thing by a fine.¹ Another evasion of the legal public transfer by feoffment was the lease of land with entry upon it, and the subsequent release of the tenant, which gave him a freehold estate.²

The chancery permitted secret conveyances by allowing the creation of uses to be by word of mouth or by implication.³ The beneficiary owner need not be known. An owner might also covenant to stand seized for another without livery of seisin. By these conveyances uses could be created without the transmission of estate. To prevent these obscure conveyances the Statute of Enrollments (1536) provided that freehold estate should pass only if the bargain and sale were enrolled within six months. This created a new conveyance by registered deed, which was a step toward secret conveyance.⁴ The Statute of Enrollments applied only to freehold estates, not to terms of years. A secret mode of transfer was invented by which an estate for years was created by bargain and sale and immediately the new tenant was given a release of the reversion to the seller. This release was the general mode of conveying freeholds until 1841, when a release was made as efficient as a lease and release by the same parties.⁵ One document was sufficient.

¹ Digby, *op. cit.*, p. 254.

² *Ibid.*, p. 320.

³ Jenks, *op. cit.*, p. 301.

⁴ *Ibid.*, p. 303.

⁵ Digby, *op. cit.*, p. 367. Jenks, *op. cit.*, p. 305.

Other measures of recent times have removed the disabilities of certain classes of owners. A king or a corporation could not convey by bargain and sale, nor could terms of years be so transferred. A grant was necessary. Freehold estates lay in livery of seizin, other estates lay in grant. The Act to Amend the Law of Real Property (1845) enacted that all corporeal hereditaments as to conveyances of freehold should lie in grant as well as in livery. The deed of grant became the common form of transfer. Fines and recoveries were abolished in 1833. Since the Disentailing Assurances of 1833 a tenant in tail can convey an estate in fee simple without recourse to fines and recoveries. This assurance is an enrolled deed and requires the consent of the "protector of the settlement."¹ Since Lord Cairns' bill of 1881 the conveyancer may entirely ignore forms and fit his instrument to the transaction in hand.² No especial words, such as "enfeoff," are necessary as formerly. And solicitors are no longer paid according to the length of their papers.

In order to curb the power of destroying future private rights in land by the exercise of present powers a limit must be set within which future estates must take effect. Future estates after the introduction of recoveries, were liable to be turned into fee simple and alienated as soon as the tenant in tail came of age. Settlements were prevented from creating estates in remainder by the rule against perpetuity, which prevented alienation of lands for a longer period than lives in being and twenty-one years after. Attempts to control alienation for a longer period are void. The Thelusson Act forbade the accumulation of incomes of any property beyond the life or lives of persons making the disposition for a period of more than twenty years from the

¹ Jenks, *op. cit.*, p. 357.

² *Ibid.*, p. 310.

death of such person or persons, or longer than the minority of such persons as would, if of full ages, be entitled under the disposition to the income to be accumulated.

Thus land was slowly approximated to a chattel. The question may now be proposed, What part had the increase of incorporeal rights in the increased transferability of land? These partial rights increase the possibility of obtaining the services of estates, while lessening the necessity of personal attachment to the land. Hence they increase transferability and freedom of ownership. The increasing "Dinglichkeit," the development of the feeling that the tenurial rent service, the rents charge, the annuities, the corodies, or annual provisions for religious houses, advowsons or livings and the rights of common may be treated as things transferable apart from the land, aids in the reduction of land, less these rights, to a thing that may be freely owned. The increase of contract increases the freedom of land ownership, by decreasing direct dependence on the land. The Anglo-Saxons scarcely knew what credit was.¹ The evidence of contracts in time decreased in solidity from the presence of the actual property on which it is based to the *festuca*, or notched stick, then any trifle connected with the land, then the handclasp, then the piece of paper; and the solemnity of contracts decreased from the *fides facta*, with God as witness, to the mere signature of those contracting. The "earnest" or "symbolic payment," "the Holy Ghost's penny," the *quid pro quo*, even if it were as cheap as prayers, was necessary to a valid promise in the fourteenth century. The development of contracts about the land aided in the increase of the practice of letting land for terms of years² and the qualified villeinage by agreement of the

¹ Pollock and Maitland, *op. cit.*, ii, p. 182.

² *Ibid.*, ii, p. 215.

thirteenth century must be recorded as influences in the freeing of the land.

Early systems of law do not recognize resort to a debtor's land for payment of his debts.¹ Recourse to the land was obtained only in recent times. Judgments were first enforced against the land in behalf of the crown. By the Statute of Westminster (1285) creditors were enabled to obtain judgment in an action at common law, and to choose either to have execution by the sheriff upon the goods of the debtor, or to have a writ of *elegit* commanding the sheriff to deliver to him one-half of the land until the debt be levied. The Judgment Acts (1838) extended action to legal and equitable interests of any kind.² The Judgment Act of 1864 gave the creditor in possession an order for the sale of the debtor's interest. The liability of the heir for debts was formerly confined to those secured by land. As late as 1807 it became possible to realize out of the lands of the deceased a debt that was not secured by a deed.³ The Bankruptcy Acts (1883-90) give a receiving order against any debtor upon proof of certain conditions constituting an official receiver a quasi-trustee and manager of all the debtor's property.⁴ Married women's property was also made subject to bankruptcy proceedings in 1882.⁵

The right of disposing of land freely by will was likewise slowly gained. The Anglo-Saxons redeemed their souls with *post obit* gifts. These later became impossible because there was no livery of seizin.⁶ In the eighth century the dying wiped out their sins at the expense of their

¹ Jenks, *op. cit.*, p. 247.

² *Ibid.*, p. 257.

³ *Ibid.*, p. 264. Digby, *op. cit.*, p. 284.

⁴ Jenks, *op. cit.*, p. 248.

⁵ *Ibid.*, p. 253.

⁶ Pollock and Maitland, *op. cit.*, ii, pp. 316-7.

heirs by giving the bookland to the church, which protected them by the witness of the clergy from the "avarice of their kinsfolk."¹ These wills bequeathed the soul to God, the virgin and the saints; the body to a certain church, a mortuary present being made with it, and bequests were made for bridges and friars. "The earlier the will the more prominent is the other-worldliness of the testator."² The church was the executor of the will and administered the estate for the good of the soul of the deceased. Naturally the church made it heinous to die intestate. In the twelfth century, the courts intervened to prevent the church from taking advantage of infirmity.³

Since land holding was both property and office the king desired that the fiefs should not be divided.⁴ By far the greater part of the free tenures in England at the end of the twelfth century were military tenures and fell within the rule of primogeniture, which took the place of an older more equitable division of property. Despite the fact that men were "too fond of their younger sons,"⁵ the court of Henry II made the rule of primogeniture apply to all free-men. Later customary primogeniture applied even to villein tenures.

Yet in some boroughs the ancient liberty of will had been preserved.⁶ Under the chancellor the practice of disposing of uses of land by will became prevalent.⁷ The devise was merely the disposition of a use. The Statute of Uses sought to abolish the power of devising lands, but it was ineffectual. The Statute of Wills (1540) enabled the

¹ Pollock and Maitland, *op. cit.*, ii, pp. 316-7.

² *Ibid.*, ii, p. 338.

³ *Ibid.*, ii, p. 326.

⁴ *Ibid.*, ii, p. 261.

⁵ Glanville, quoted by Pollock and Maitland, *op. cit.*, ii, p. 262.

⁶ Digby, *op. cit.*, p. 377.

⁷ *Ibid.*, p. 377.

tenant in fee simple "to give by his last will and testament in writing" all lands in socage and two-thirds of those in knight's service. The abolition of military tenures (1660) made all lands devisable. The security of wills was aided by the Statute of Frauds which made signature and three or four witnesses necessary, and the Wills Act (1834) forbade voiding the will on account of the incompetency of a witness or on account of the interest of a witness. The intention of the testator is made the basis of interpretation and fees simple are created by the courts on the slightest evidence of intention to create them. The Wills Act made words of inheritance unnecessary to pass a fee simple and made the will include lands subsequently acquired, which it had never done before. The will was made to include all property, contingent, executory and future interests, and rights of entry and copyholds. Before this act a devise of land passed only leasehold and copyhold if the testator had no freehold at the time of the will.¹ A devise of real estate without any words of limitation passes the whole of the testator's interest.¹ A devise of real estate to a trustee or executor will give him the whole interest of the testator, unless an express or implied smaller estate is given him. By the Land Transfer Act (1897) real estate is treated like chattels real and terms of years in land, and does not pass directly to the devisee, but only after transfer from the personal representative, who will have power to sell the lands for the payment of the testator's debts. The construction of wills is "limited only by the possibilities of language."² The power of bequest is now free. "It is probable that at the present day, the amount of property that passes by descent in the course of any year is comparatively small."³

¹ Jenks, *op. cit.*, p. 362.

² *Ibid.*, p. 366.

³ *Ibid.*, p. 192.

Yet intricate settlements have long prevented freedom of property devise. "A settlement is any instrument or instruments by virtue of which an interest in land stands limited to or in trust for any person by way of succession."¹ Its object is to limit the successive legal interests in land and so provide for the members of a family, usually preferring males; or a personal settlement is one in which property is treated as an instrument for providing a certain amount of income. A settlement is a successful evasion of the rule against perpetuities. But even these restrain alienation only by custom. The Settled Land Acts (1856-1882) undertake to make all settled land subject to alienation. The tenant in tail may sell the land, exchange or partition to lease; he may dedicate it to a public use, or mortgage it or effect improvements out of any capital arising from sale of settled land.² This is almost absolute ownership, although all the persons entitled under the settlements are protected.

The heir as well as the testator has gained greater freedom. He is no longer a universal successor to all the obligations of his ancestor. He is disentangled from the ancestral personality. But as late as a century after the conquest the heir was bound to warrant the reasonable gifts of his ancestor to grantees or their heirs, and the liability was not limited to the amount of property inherited from the same source.³ In Bracton's time he was bound only to the extent of the property that descended to him.⁴ But the heir's *persona* or representation of his ancestor has for centuries been confined to land.⁵ By the time of Ed-

¹ Jenks, *op. cit.*, p. 313.

² *Ibid.*, p. 50.

³ Holmes, *Common Law*, p. 347.

⁴ Pollock and Maitland, *op. cit.*, ii, p. 343.

⁵ Holmes, *op. cit.*, p. 350.

ward III the executor took the place of the heir in the collection and payment of debts.

Recent acts have established still more clearly the character of private property in land. It has been proposed to abolish primogeniture as a rule for intestate succession. The crown's right to forfeiture (except for outlawry) was abolished in 1870. Outlawry in civil cases was abolished in 1819, forfeiture for waste in 1833, the forfeiture for attempted alienation by feoffment of an estate greater than that of the alienee, and for alienation to an alien, in 1870. By the common law only co-owners by inheritance could partition.¹ By statutes (1539) joint tenants and tenants in common, or joint tenants for life or for years were given the right to enforce partition.¹ The Married Woman's Property Act gave a married woman the same right as a single woman to acquire, hold, dispose by will or otherwise, without the intervention of a trustee.

The equitable interest in lands by which legal burdens were escaped has been gradually subjected to legal burdens. By the Intestate Estates Acts (1884) equitable interests are made to escheat in the same way as the legal estate.

In theory nothing in England is unowned individually. "Strictly speaking the right to be even on a high way is limited to the purpose of passing and repassing."² Even the air is owned. One cannot, technically, go over the land in a balloon without consent.³ The land belongs to the owner to the heights above and to the depths below.

Although a bold effort has been made to see how land ownership has been freed to approximate what is usually understood by private property, the existence of trusts and building settlements under which so much land is held

¹ Jenks, *op. cit.*, p. 350.

² Pollock, *Land Laws*, p. 13.

³ *Ibid.*, p. 16.

makes it scarcely intelligible to speak of a regime of private property. It is tendency to private property.

In all European countries before the Revolution the land systems were stamped with feudalism. On August 4, 1789 serfdom was abolished in France. In Germany in 1807-11 serfdom was abolished, free purchase and sale of land was granted and permission to break entails was given. Peasants were made complete owners by the cession of one-half or one-third of their holdings. Austria abolished the whole feudal regime in 1848. This illustrates the general tendency in Europe. Private property in land became a familiar conception. This was an accompaniment of the decline of monarchy. "Down to as late a period as 1860, at least, the tendency of land legislation was all in one direction. This was toward making land an object of individual and uncontrolled ownership of free contract and free disposal, toward making it the object of possession and exchange in just the same way as a piece of furniture, a horse, money, or any other article at the disposal of its owner. Within a period of three-quarters of a century the medieval bases of land holding had been destroyed and an individualistic form of tenure substituted; land had been brought into the category of personal ownership. The laws of the middle of the century, moreover, over all Europe seemed to tend toward a further development of the characteristics of the new system."¹

While land was becoming free, individual ownership of commercial and industrial privileges also developed. The industrial unification which produced the gild continued in national control of commerce and industry, which deprived the guilds of municipal powers, of social obligations and the

¹ Cheyney, E. P., "Recent Tendencies in Land Tenure," in *Annals of the American Academy*, Sept., 1893.

determination of apprentice laws. Edward VI confiscated the property of religious and social guilds; the statute of apprentices (1563) took the regulation of employment from the crafts. The guilds were effete in the time of Elizabeth.¹ New monopolies were taking their place. The queen in the exercise of her "prerogative, the choicest flower in her garden" granted to favorites monopolies in the trade of everything from dried pilchards and ox-shinbones to Greenland whales and the Spice Islands. Two hundred men had five-sixths of the foreign trade of England.² When the queen was aiding Hawkins to dispose of cargoes of slaves by the loan of the *Jesus* and the use of a hundred men well armed to encourage the Spanish to buy, it was inconceivable that commerce could be a private property. Political function was attached to commercial ownership as to manorial lordship. The Italian monopoly of the tin mines of the thirteenth century, the Fraternity of St. Thomas a Becket (1358), which had a monopoly of English wool at Bruges, and became the Merchant Adventurers, the great regulated companies, later the joint stock companies, like the East India Company (1600), in short all of the great companies of several centuries had been granted, had acquired or had sought monopoly. They were partnerships with the government much as the continental Hanseatic League had been an *imperium in imperio*.

The right to possess property in the earlier trading companies was nominally somewhat freer than that in the guilds. Any merchant might be admitted, subject to exorbitant fines. But the trading in the regulated companies, like that under the guilds, was individual under the rules. The failure of individual traders made necessary the joint stock or-

¹ Cunningham, *Growth of Industry and Commerce in England*, p. 45.

² Hume, quoted by Baldwin, *Modern Political Institutions*, p. 165.

ganizations. Unlike modern corporations, these companies forbade their members to have membership in other companies.

The right to the privileges of these companies was also burdened with the religious duties of the corporation to its servants, such as taking to the Spice Islands the craft gild custom of morning and evening prayers—a sort of “welfare work,” probably not without an eye to the commercial advantages of sobriety. A more serious limitation was the centuries of minute government regulation. Political unity was not exercised in the guarantee of individual liberty, until it had secured the strength of the realm, through the effective regulation of commerce and industry. The foreign trade was subject to the necessity of keeping the bullion at home. The succeeding policy of keeping the balance of trade at home also prevented freedom. Protection to home industries required sumptuary laws as to consumption. Thus serge was substituted for silk by law for the covering of buttons and working of button holes (1738).¹ The regulation of one industry even for its promotion was destructive of other industries, and while developing commerce, made uncertain the conditions of ownership. When the ancient municipal commerce of the fourteenth century had grown to national commerce, when a stable commercial realm had been erected and before its regulation had been relaxed, a new stage of liberty to own had developed. Opposition to personal monopolies was effectual in an act of 1623. They were re-established by Charles I; but all monopolies not confirmed by parliament were practically abolished in 1689. At the beginning of the eighteenth century, while special charters were still necessary, so many companies were chartered as to indi-

¹ Cunningham, *op. cit.*, p. 338.

cate liberty. In 1720, for example, two hundred companies were chartered, including one for Making Salt Water Fresh. To trace fully the liberty to own freely commerce and industry, it would need to trace the development of political and intellectual liberty, the modern freedom of interest, the legalizing of the negotiability of notes, a practice developed by the merchants, the stability of the currency, the establishment of the Bank of England in 1694; the introduction of fire and life insurance (1680-1700); the appearance of thousands of independent merchants and adventurers; the increase of skill and providence, and of "capital," both real capital and money and credit, by which the modern "fluidity of property" was produced. Money is the destruction of the "static" state and a necessity to the ownership of "incorporeal hereditaments." Trade in money assimilates all property to chattels. Stock jobbing was already "scandalous" at Defoe's time. The South Sea Company (1711-48) sold shares of the par value of 100 at 1200, which led to a bill to suppress "the infamous practice of stock jobbing." The mercantilist policy and the industrial regulations were outgrown by the industrial development which they themselves had wrought. The Act of 1834 enfranchised the factory towns. The regulation of commerce and the prohibition of colonial manufactures was changed by the loss of the American colonies. Freer trade was secured in the colonies by Huskisson. Commercial treaties (1823) were made in abrogation of hostile tariffs and protective rules. The tariff was removed in 1842 and the corn laws were abandoned in 1846.

Property in commerce was becoming as free as property in land and men had already been. Thus Pitt in 1783 opposed the proposition to take the government of the 30,000,000 people of India away from the East India Company as an "inequitable confiscation of property." This

illustrates the modern belief in the immemorial sanctity of property. The first result of the liberty to own industry and trade was naturally a predominant form of ownership less corporate in character than that under guilds and monopolies. But the nature of co-operative production produces co-operative forms of ownership. It might be said that the liberty of ownership of trade culminated in the individual ownership of factories and that the development of corporations should be considered not as liberty of ownership, but as limitation of ownership. But if there is a general period of liberty to own all the possible forms of ownership, the liberty to own shares in corporations must be embraced in it. Modern corporations were fully established in the nineteenth century. The earlier corporate forms as shown already, were not definitely limited in membership and were not distinguishable from political sovereignties; the *ficta persona* could not come out of the canon law to be applied to technical corporations, until the guilds and monopolies had been crystallized to select and closer bodies. They must approach nearer to individual activity before receiving individual freedom. This growing freedom received aid in the acts (1825-7) conceding the right of workingmen to organize. Many associations without charters were in business under company names. Many great banking institutions existed without incorporation. The first general incorporation law was passed in 1844, the Joint Stock Companies Registration Act requiring registration of purpose, capital, subscription, duration and other particulars. The members, however were under the same liability as an ordinary partner. By subsequent acts (1856-62) limited liability companies may be formed. Between 1862 and 1890, 35,000 companies were incorporated.

The internal disintegration resultant on the development of strong national unity had resulted in the modern concep-

tion of private property in all things capable of being owned. At the beginning of the nineteenth century England was filled with want and misery and child labor. Labor's importance relatively to capital declined. Economic responsibility was detached from economic opportunity. It is not possible to assert the relation of these facts to each other. But reference to statistics is inconvenient to the individualistic theory of a regime of private property.

The mythical period of *laissez faire* was somewhere about the transition from the older limitation to a new limitation, a new tendency to estate. It may be examined whether the modern liberty of property contained or contains the embryo of its successor.

The struggle of the underworld must be allowed some influence in both the liberation and the subsequent limitation of property. Thus the demand of the peasants (1381) "that all men from henceforth might be enfranchised to buy and sell in every county, city, borough, town, fair, market or other place within the realm of England," was prophetic of liberty; while the complaint of John Ball looked still further: "A ye good people the mater gothe not well to pass in Englande, nor shall not do tyll everything be common and that there be no villayns nor gentylmen."¹ The Christianity of Wycliffe was somewhat influential in the mitigation of property.

Slavery was not extensive because it was unnecessary.² The same reason allowed its complete limitation before the modern limitation of the other forms of ownership began. Queen Elizabeth, who exercised the royal prerogative of beating her maids of honor black and blue and sold slaves

¹ Froissart, quoted by Jusserand, *English Wayfaring Life*, p. 275.

² Cf. *supra*, p. 60.

abroad, set free the bondmen at home.¹ Charles II abolished slavery by statute. The slave trade was prohibited in 1807. In 1833 all slaves in British territory were emancipated with £20,000,000 indemnity.

The first freeing of the land while excluding inferior tenants, did not result in the immediate concentration of the land in the hands of the lords. Much of the enclosure was by small freeholders. The wars of the Roses depleted the nobility and aided in the rise of the yeomanry. But after 1688 the landed gentry were politically supreme and crushed the yeomanry by the unhindered exercise of private property rights. The yeomen could not meet the system of large farming, nor defend themselves against the unlawful enclosures by the rich. The poor law often compelled them to contribute through the rates to the support of the tenants of the rich neighbor.² When he was not otherwise dispossessed, the small farmer was ruined by the low prices and by the greater proportionate cost of his enclosure as compared to the large farmer.³ And the peasant whose allotment in a common might be an acre was compelled to sell both his acre and his cow to his rich neighbor.⁴ "The English yeoman of the days of Henry V and Queen Elizabeth as a class has disappeared entirely."⁵ Concentration of wealth is proof of liberty and prophecy of limitation. It is evidence that ownership is untrammelled, for property has much greater accumulative powers than men have. There were perhaps 200,000 land owners in the eighteenth century. A hundred years later there were perhaps 30,000.⁶ Concentration of ownership need not immediately constitute a limitation of the form

¹ Brodrick, *op. cit.*, p. 176.

² Gibbins, *Industry in England*, p. 279.

³ Cunningham, *op. cit.*, p. 477.

⁴ *Ibid.*, p. 487.

⁵ Brodrick, *op. cit.*, p. 164.

⁶ *Ibid.*, pp. 156-7.

of property, but it becomes a limitation of its substance, since the people who are dependent on the land and who give it value continue to live and become incidents of ownership that presage future customary claims. If it should be found that the attained equilibrium of classes cannot be widely disturbed without impunity then private property seems to be yielding to estate. It seems impossible to regard private property in land as an unchangeable institution if there is truth in Brodrick's statement of twenty-five years ago that one one hundred and seventieth of the population owned one acre each, that four-fifths of the land was owned by 4000 persons.¹ It seems more intelligible to explain the present land system as an advance in some new form of estate, if it is true that the proportion of land holders was ten times greater at Domesday than in 1880.² Moreover the real property law has remained stamped with feudalism. "From the time of the introduction of methods of breaking the entail to the institution of family settlements, the ownership of land was more absolute and its disposition less restricted than it had been for two centuries before or than it has been since."³ Intricate settlements now take the place of the older entail, until a much larger area is under family settlements than under free disposal.⁴ There is less liberty of disposition than there was in the seventeenth and eighteenth centuries. The result of time and change, with the survivals from the successive periods, make the land system "a structure of the most complex and heterogeneous kind."

Minute attention cannot here be given to the numerous rights *in alieno solo*, known as servitudes, such as "commons" or rights of pasturage, gathering acorns, cutting

¹ Brodrick, *op. cit.*, p. 164.

² *Ibid.*, p. 172.

³ *Ibid.*, p. 32.

⁴ *Ibid.*, p. 32.

turf, fishing or estovers, cutting timber and furze, franchises, advowsons, tithes, annuities, sporting rights, watercourses, lights, rights of support—all rights which limit ownership for individual and social benefit in the land to which they are attached. The Statute of Limitations shows the nature of ownership as a social institution. A man may not “sleep upon his rights” and then dispossess the actual possessor. No entry, distress or action shall be brought to recover any land or rent, but within twelve years after the right to bring the same shall have accrued to the person seeking to enforce it. New rights of tenants have been developed by recent efforts to ameliorate their condition. By the Agricultural Holdings Acts (1851-1883) the tenant’s improvements on the property are secured to him. The Allotment Acts of 1887 and 1894 also allow local authorities to buy land by agreement, if possible, or by authority, if necessary, to sublet to small tenants. The policy of enclosing commons has been reversed since 1865.

Measures have been taken to relieve the oppression wrought upon the Irish by private property in land. Of the various legislative enactments dealing with Ireland between the years 1816 and 1842, no fewer than thirty-two were in favor of the landlord while legislation entirely neglected the tenant.¹ The idea of absolute ownership prevailed in the government’s dealings with land, in the twenty years after 1845.² It was sought to compensate the tenant for starvation, disease, and “clearances” by consolidating farmers, and to discourage his habit of shooting landlords, without disturbing the absolute property right of the owners. A commission proposed to determine what compensation should be given the tenant for work was killed by the cry

¹ Taswell-Langmead, *op. cit.*, p. 641.

² See Dunning, W. A., *Political Science Quarterly*, vol. 7, p. 504 *et seq.*

of "confiscation." The next twenty years secured legal recognition of the tenant's right. Gladstone's Landlord and Tenant Act (1870) secured property rights for tenants, fixed tenure and compensation for eviction. The landlord's right to demand any rent he pleased was not yet disturbed. In more recent years efforts have been made to turn the tenant into a proprietor. The Land Law of 1887 secured the free sale of tenant rights, a secure term of fifteen years, renewable forever and fixed rent during a term on condition of due payment, no waste and no subletting. Then there was judicial reduction of rents from 1881 to 1886 of 18.2 per cent. Compulsory expropriation of land has more recently been resorted to. By the Ashbourn Acts (1885-7) the whole amount of the purchase price was advanced to the tenant with repayment in forty-nine years, interest 4 per cent. By the law of 1903 \$500,000,000 was to be loaned to Irish farmers at $3\frac{1}{4}$ per cent.

Limitation of the use of industrial privileges has been so continuous that it is not possible to fix any beginning of the increasing limitation of the present. The personality of the servant, the chief resource of industrial ownership, has been recognized in many ways. Before the doctrine of free contract became supreme in English political philosophy, legislation in behalf of labor was already developing. In 1802 the first child labor law was passed. "From this humble beginning the protection of the state was gradually extended to "young people," to the textile industries (1833); to women (1844); then to all large industries (1854) then to the smaller workshops generally (1867) and finally blossomed out into full fledged factory acts regulating industry generally in behalf of the health and safety of the laboring population. Under the individualism of the strong, labor unions of the weak inevitably gained in strength and struggled for the vestiges of status

against the insecurity of an age of contract. The necessity for doing something about the distress of labor led to the repeal of the statutes against combinations, thus giving some legal status to the influence of labor unions.

The individual liberty made possible by political unity reacted on that unity with measures of equality, such as the Habeas Corpus Act, right of petition, destruction of governmental absolutism, the ascendancy of the House of Commons after ages of struggle with autocracy. As unity became absolute, absolutism became corporate. Under this diffused unity, economic liberty grew. The new centralization perhaps presages some new and better adjusted ownership, private property shorn of some of its anti-social power, possibly the national middle class hereditary estates suggested by Gneist.¹

¹ Quoted by Taswell-Langmead, *op. cit.*, p. 643.

CHAPTER V

LIBERTY TO OWN SLAVES IN AMERICA

LIBERTY of ownership, private property, in America as in England was greatest with the completion and democratization of political unity under the influence of the sentiment best expressed by John Woolman:¹ "I believe that liberty is the natural right of all men equally." It is unnecessary to detail the establishment of the constitution and of universal suffrage, a political privilege essential to liberty of ownership. Franklin said to those who have no landed property, "the allowing them to vote for legislators is an impropriety."² Hamilton said: "Those who have no property have no will of their own."² Calhoun said: "There has never yet existed a wealthy and civilized society in which one portion of the community did not in point of fact live on the labor of the other."³ They but repeated Plato and Aristotle, who thought virtue (ability) impossible without leisure. Hence those who labor to live are not fit to govern. Lincoln modernized this sentiment: "A Yankee who could invent a strong handed man without a head would receive the everlasting gratitude of the mud-still advocates." However unreal the right of property may be to the propertyless, its nominal concession to all men was completed by the grant of civil and political rights to "the

¹ *Sermon*, p. 9.

² Merriam, *American Political Theories*, p. 84.

³ *Ibid.*, p. 239.

strong handed man without a head." When however this point had been reached, the extension of the suffrage ceased to be a guarantee of private property of the completest form and became a restriction. The extension of liberty is its own restriction.

Although private property in slaves had not come to be held immutable before its national guarantee yet it had long been a virtual right of Englishmen in America. It was found chiefly in the south, since in the north as in England, the limitations of nature made possible the appropriation of the services without the appropriation of the servant. Goldwin Smith says: ¹ "The sole source of slavery was in the desire of Europeans in a languid climate to have the work done for them instead of doing it themselves." George Washington complained that the farmers actually had to work beside their servants to make a profit. An English slave agent in Georgia said: "It is as clear as light itself that negroes are as essentially necessary to the cultivation of Georgia as axes, hoes or any other utensil of agriculture." ² Had not the Dutch sailed up the James with African creatures capable of domestication, it is probable that the incipient form of slavery known as indenture might have become a system of slavery, by the use of penalties and other devices for extending the time of indenture, such as were already in use. Indeed the first colonists were themselves the victims of the rapacity of the London Company. Dreaming of gold they found chains, marching to their daily work in squads under the lash and subject to penal servitude for petty offences. ³ In 1619 one hundred poor boys and girls were taken from

¹ *The United States*, p. 221.

² Burghardt-DuBois, *Slave Trade*, p. 8.

³ Ballagh, *White Servitude in Virginia*, pp. 24-6.

the streets of London to be bound to the tenants for a term of years, at the end of which time they were to become tenants at halves.¹ Men were transported for crime or were inveigled by false promises to sail for America there to be bound out for passage if they found no place. Between 1664 and 1671 fifteen hundred a year of these "kids" were sent to Virginia.² In 1683 there were in Virginia 3000 slaves and 12,000 servants.³ This system spread through all the colonies. By the infliction of penalties the term, usually from two to ten years, might be prolonged to perpetual servitude. Thus in Virginia runaways were fined double time. Many of these servants were transported convicts, frequently political, whose blood, perhaps, still flows in American veins. "Perhaps fifty thousand convicts were sent to nine American colonies."⁴ These servants were wont to run away. "Ran away from Rev. D. Magill, Upper Marlborough, Maryland, a servant clothed with damask breeches and vest, black broad cloth coat, broad cloth cloak of copper color, lined and trimmed with black and wearing black stockings."⁵ One Sarah Wilson, a maid of honor to the queen, stole some valuable jewels and was transported to Maryland in 1771 where she was sold. She escaped and assumed the title of "Princess Susanna Caroline Matilda, sister to our sovereign lady the queen." Having courtly clothing and jewels and the queen's picture, the gentlemen of the farther south, to which she fled, gave her the homage and the loans due a princess, until her master's advertisement and the resulting hue and cry discovered the

¹ Ballagh, *op. cit.*, p. 29.

² *Ibid.*, p. 36.

³ *Ibid.*, p. 93.

⁴ Butler, "British Convicts Shipped to American Colonies," in *American Historical Review*, ii, p. 12.

⁵ *Ibid.*, p. 29.

fact that her serene highness was after all only vagabond property.¹ One Henry Justice, Esquire, of the Middle Temple, stole from the library of Trinity College, Cambridge, "a Field's Bible, with cuts and common prayers, value 25l., Newcastle's Horsemanship, value 10l., several other books of great value, several tracts cut out of books, etc." "Being brought before the court he desired them as they had discretionary power either to transport or to burn in the hand, etc., he might not be sent abroad, which would first be a great injury to his children and his clients with several of whom he had great concerns; secondly for the sake of the university. He had a number of books belonging to them, some sent to Holland, and if he were transported he could not make restitution. As for himself he would rather go abroad having lived in credit before this unhappy mistake." He was transported. Possibly he became the tutor of George Washington, who was educated, according to Boucher, by a convict servant whom his father bought for a school master.²

This temporary form of wealth was publicly encouraged in various states, by bounties, as in Massachusetts (1709) and by the sale of convicts. Thus white criminals were sold from colonial New York to the West Indies. In 1669 Governor Lovelace ordered Marcus Jacobson to be sold as a servant to Barbadoes. He had been tried by a special commission and sentenced to death, but this sentence was softened to whipping, branding, imprisonment, transportation and slavery.³ New England Quakers were sold to the Barbadoes and elsewhere.

Many of the incidents of property attached to this partial

¹ Butler, *op. cit.*, p. 29.

² *Ibid.*, pp. 26-7.

³ *American Historical Association Reports*, 1890, p. 88.

ownership. Servants could not get married without the owner's consent. The right of the servant to have goods was abridged. The saddle does not belong to the horse; nor the bell to the cow. As a yoke is put on a fence-jumping cow, so in view of the peculiar "fluidity" of this property irons were put on runaway servants. As horses are taught by whipping not to kick, so servants were whipped for running away. As sheep in the mountain ranges are daubed with red paint to establish their owner's right, so servants might be branded with their master's mark. It is said that any one might lawfully kill a bound servant who ran away.¹ In Pennsylvania an indented servant could be sent to jail—a sort of storage warehouse—by his master for an indefinite time. The right to sell such property was early established. George Sandys, the treasurer of Virginia, in 1623 was forced to sell the only remaining eleven servants of the company for mere lack of provisions, and a planter sold seven men on his plantation for one hundred and fifty pounds of tobacco.² Thereafter servants were rated in inventories of estates and disposed of by will and deed with other property. The servants could be levied on for the debts of the master equally with his goods and chattels. This property, being of less value than slaves, was used up with less care and the condition of white servants was often worse than that of black servants who were worth saving. Wm. Eddis, surveyor of customs of Annapolis, said in 1770 that since negroes were a property for life, the death of slaves in the prime of youth and strength was a material loss to the proprietor; they were therefore in almost every instance under more comfortable circumstances than

¹ Talcott Williams, *Labor a Hundred Years Ago*, pp. 5-6, and McCormac, *White Servitude in Virginia*, p. 57.

² Ballagh, *op. cit.*, p. 43.

the miserable European, over whom the rigid planter exercised an inflexible severity.¹ They were strained to the utmost to perform their allotted labor. But there were restrictions on this property. In case of the abuse of a servant by his master the court could sell the servant away from his master. In 1662 private burial was forbidden in order to prevent the whipping of servants to death. In 1765 the practice of binding illegitimate children of servants for thirty-one years—a most important step in this incipient slavery—was declared by the legislature to be an unreasonable severity to such children. In North Carolina masters were fined £5 for freeing sick servants from obligations, or discharging them without trying to heal their malady.² In 1662 an act was passed in North Carolina to give the servants “propriety in their own goods and by permission of their masters to dispose of the same to their own advantage.”³

It was not however due chiefly to legal restrictions but to the economic superiority of black slavery that indenture was superseded, and definitely abolished by various state constitutions during the next century. Possibly also the passing of feudal incidents on land aided in the extension of slavery and substituted this for the feudal ownership of men. Thus in Georgia, upon the establishment of fee simple in land and unrestricted slavery, the population increased from 2,000 in 1750 to 10,000 whites and 8,000 negroes in 1766.⁴ Governor William Berkeley reported in 1670 that there were 2,000 black slaves to 6,000 Christian servants.⁵ In 1790 there were 700,000 slaves of whom 40,000 were in

¹ Hart, *American History Told by Contemporaries*, vol. ii, p. 309.

² Bassett, *Slavery and White Servitude in North Carolina*, p. 250.

³ DuBois, *op. cit.*, p. 3.

⁴ Banks, *Land Tenure in Georgia*, p. 14.

⁵ Hart, *op. cit.*, i, p. 240.

the north.¹ Thus this form of ownership attained to the greatest freedom. Negroes were house servants and farm hands in New England and New York, lived under "a mild serfdom" in Pennsylvania and New Jersey, under an aristocratic caste system in Virginia and Maryland, and further south were more completely beasts of burden, for there in time their spendthrift masters subjected them to such legal punishments as burning, crucifixion and starving.² The attachment that sentimental owners feel for things they have long owned, particularly for live things, was formed in a peculiar degree for many slaves. And the chattels often returned a human affection. They adopted and emphasized the religious sentiments of their masters, and through the devotion therein inculcated they strengthened their owners' claim upon themselves, as a dog cannot be driven away from its master.

Slavery was based on custom. The common and statute law of England gave it no legal existence. In 1772 in England the "Somerset decision" disallowed a claim to a slave who had been turned out when sick and then reclaimed, because the law did not recognize "so high an act of Dominion."³ The colonial charters are silent. The security of slave property was not attained at once. Thus Samuel Sewall said in 1700:⁴ "These Ethiopians, black as they are, seeing they are sons and daughters of the first Adam, the brothers and sisters of the last Adam and the offspring of God, they ought to be treated with a respect agreeable." There was much of such opposition. The Germantown Quakers as early as 1688 registered a vote against the "traffic in menbody."⁵ New Jersey freeholders

¹ Thomas, *The American Negro*, p. 7.

² DuBois, *op. cit.*, p. 6.

³ Lalor's *Encyclopedia*, "Slavery."

⁴ Hart, *op. cit.*, i, p. 297.

⁵ Hart, *op. cit.*, ii, p. 291.

had declared (1676) that all and every person and persons inhabiting the said provinces shall as far as in us lies be free from oppression and slavery.¹ Duties on imports were frequent in all the colonies throughout the eighteenth century. Pennsylvania (1712) prohibited the slave trade, but the act was promptly disallowed by England.² South Carolina (1713) imposed a heavy duty on the trade, upon the discovery that "the number of negroes do extremely increase in this province and through the afflicting providence of God the white persons do not proportionately multiply, by reason whereof the safety of the said province is greatly endangered."³ In consequence of Cato's insurrection that province in 1717 prohibited the trade. The Privy Council disallowed it. Oglethorpe (1733) prohibited slavery itself as being against the laws of Georgia and the fundamental laws of England.⁴ New England morality was inexpensive; slavery did not pay. In the eighteenth century the trade was encouraged—with the other colonies—by an entire rebate, upon re-exportation, of the restrictive duty.⁵

Notwithstanding resolutions by the Continental congresses and southern conventions, "the opprobrium of infidel powers" continued to flourish and the Northwest ordinance (1787) made the peculiar provision that property that was owned in one part of the country might be owned in another, while the constitution secured the trade until 1808. Opposition began to center in the north and the constitutions of the New England states and Pennsylvania had abolished slavery outright or provided for its gradual extinction. The southern statesmen at first considered it a temporary evil. Jefferson said: "I tremble for my coun-

¹ DuBois, *op. cit.*, p. 24.

² *Ibid.*, p. 22.

³ *Ibid.*, p. 10.

⁴ *Ibid.*, p. 24.

⁵ *Ibid.*, p. 30.

try when I reflect that God is just and that his justice cannot sleep forever."

But civil recognition of the existing rights of ownership had long been increasing. The civil law rule *partus sequitur ventrem* was adopted by statute in Virginia in 1662 and later in other colonies. Maryland in 1663 had declared that negroes should serve *durante vita* and their children also.¹ Virginia in 1670 declared that servants not Christians imported by shipping should be slaves for life. South Carolina passed an act in 1690 for the "better ordering of slaves," in 1712 formally legalized slavery and in 1740 adopted the civil law rule. From this early time legal recognition grew.

After the Revolution all the states prohibited the slave trade without seriously hindering its increase. The first national act to prohibit the carrying on of the slave trade to any foreign place or country and fitting out slavers in the United States was passed in 1794. In 1800 it was forbidden to have any interest direct or indirect in slave ships. In 1803 South Carolina repealed her prohibitive law and legalized the growing slave trade.² In 1804 North Carolina passed resolutions proposing that the states should give Congress power to prohibit the trade. This was seconded by Massachusetts, Vermont, New Hampshire and Maryland.³ Under the constitution the trade was prohibited March 2, 1807. Thereafter 15,000 slaves were annually imported into the southern states.⁴ The punishment for equipping a slaver was a fine of \$20,000 and forfeiture of the ship; for transporting negroes there was a fine of \$5,000 and forfeiture of the negroes; while for knowingly buying imported

¹ Lalor's *Cyclopedia*, *loc. cit.*

² DuBois, *op. cit.*, p. 16.

³ *Ibid.*, p. 95.

⁴ Wilson, *History of the U. S.*, vol. i, p. 97.

negroes there was a fine of \$800 for each offense and forfeiture of the negro.¹ It was sought to make the law effective by giving one-half of the fines and forfeitures to informers. An effort to have the slave trade made a felony punishable with death was defeated because of the south's well grounded objection, that it could not be enforced.² In 1819 an act empowered the president to use cruisers on the coasts of the United States and of Africa to suppress the slave trade, one-half of the proceeds to go to the captors.³ This seemed to encourage the trade. Slave trading was made piracy and punishable with death. In 1837, 200,000 slaves were brought in.⁴ The trade under the stars and stripes was most active just before the war. Five hundred slaves were landed in Georgia in 1860; and southern commercial conventions had been demanding a change in the federal law.⁵ If misguided officers secured the criminals, they (the criminals) were pardoned by the president. Thus Jefferson pardoned one Topham twice. Madison remitted every penalty on fifteen vessels bringing in 683 negroes and pardoned four others convicted of importing slaves; Monroe pardoned four men; J. Q. Adams seven and Jackson five.⁶ No man suffered the death penalty until Lincoln's time. While stealing free men in Africa was a "misdemeanor," slave stealing in America, especially to free them, was a heinous and perilous crime. One Captain Jonathan Walker in 1844 attempted to aid some Florida slaves to escape to a neighboring island. When captured he was compelled to lie in chains on the bottom of the steamer; at Pensacola he was put in a cell saturated with

¹ DuBois, *op. cit.*, p. 104.

² Von Holst, *Constitutional History of the U. S.*, vol. ii, p. 318.

³ DuBois, *op. cit.*, p. 121.

⁴ *Ibid.*, p. 123.

⁵ *Ibid.*, p. 143.

⁶ *Ibid.*, pp. 128-9.

the blood of a criminal who had two days before committed suicide. He had neither bed, chair nor table and was chained to the floor. He had to stand in the pillory one hour, being pelted with rotten eggs, to pay as many fines as there were slaves stolen, to suffer as many terms of imprisonment and to pay the costs and to be branded in the hand "S.S." He lay in prison eleven months with a heavy chain to his leg.¹ North Carolina made it a felony punishable with death to aid a slave to escape.² Other nations had abolished the trade, an effort of England and the United States to combine for the suppression of the trade was frustrated by the unwillingness of the United States to allow the right to search American pirate ships.

The internal slave trade had never been interfered with and the number of slaves had increased from 700,000 in 1790 to 4,000,000 in 1860, when slaves were at their highest price, averaging \$450 in value.³ "Men were reared for the market like oxen for the shambles."⁴ The headquarters of the trade were under the shadow of the capital, where a British visitor, on his way to the congress, saw herds of slaves in chains in the "metropolis of liberty."⁵

While nominally opposing the trade, the acquiescence of the government was positively shown in many ways. Thus in 1790 Congress declared that it had no authority to interfere in the emancipation of slaves or in the treatment of them in any of the states. The "particularistic reaction" tended to limit governmental powers in the interests of the states. Liberty of the parts is a result of the unity of the

¹ McDougall, *Fugitive Slaves*, p. 42.

² Bassett, *Slavery in N. C.*, p. 15.

³ DuBois, *op. cit.*, p. 162.

⁴ Giddings, J. R., *Speeches in Congress*, p. 41.

⁵ Torrey, *American Slave Trade* (London, 1822).

whole. Private property gains thereby. During two decades after 1830 slavery was on the defensive; subsequently to the compromise of 1850 it seemed momentarily triumphant.

Congress (1820) gave the power in Washington to punish slaves, men and women, on the bare back, up to forty stripes for trifling offences.¹ By an act of 1836 free colored persons might be locked up if found on the street after ten o'clock.² The United States engaged its forces in the Seminole War, (1832-9) which so far effected the restoration of slaves to their masters as to give color to the accusation that it was a "great slave hunt."³ In 1843 Congress passed a bill to relieve West Florida people whose slaves had been taken by soldiers. Georgia slave holders were paid \$109,000 for slaves escaped to Florida, and \$141,000 was added as compensation for "the offspring which the females would have borne to their masters had they remained in bondage."⁴ In 1846 the Wilmot Proviso, seeking to exclude slavery from the territories acquired from Mexico was beaten in Congress. In the political campaign of 1848 the parties were silent on the controversy and in 1852 the leading parties both nominated candidates acceptable to the slave holders. An effort was made to preserve the balance of power in the compromise of 1850, by which California was admitted as a free state, the Mexican cession was left otherwise subject to the will of the settlers, the slave trade was abolished in the District of Columbia and a stringent fugitive slave law was passed by which the nation seemed committed to slavery. The idea of "squatter sovereignty" by which the western extension of slavery became possible

¹ Wilson, *Slave Power*, i, p. 304.

² *Ibid.*

³ Von Holst, H., *United States*, vol. iii, pp. 304-7.

⁴ Wilson, *op. cit.*, i, p. 454.

developed in the discussion of the admission of Oregon and in the Kansas-Nebraska Act of 1854. The Kansas constitution of 1857 in an article repeating that of Kentucky in 1850, declared "The right of property is before and higher than any constitutional sanction and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatever."¹ By the Dred Scott decision of 1857 the Missouri compromise of 1820 was rendered unconstitutional, and slaves were declared to be not persons but property, which under the constitution could be taken anywhere. Buchanan was ready to give slavery new guarantees and extension, to call on all states to repeal personal liberty laws, to extend the Missouri compromise to the Pacific, to disqualify for office all negro blood, to place slavery beyond the reach of constitutional amendments, to make it "eternal." Resolutions to this effect passed the House by a vote of 133 to 65 and the Senate by 24 to 12. Lincoln had "no objection to its being made express and irrevocable."

Liberty of ownership required certain specific laws restrictive of the liberties of the owned. The constitution and the machinery of government were employed to keep this property from using its legs. The first fugitive slave law provided that the owner or agent could bring the alleged fugitive before any magistrate of a county, city or town corporate in order to obtain a decision ordering the return of the fugitive to the state from which he fled. While other property cases involving over \$20 required a jury, any village judge could hand a man to lifelong slavery and accordingly the practice of kidnapping free negroes was encouraged. By the fugitive slave law of 1850 the machinery of the federal courts, commissioners, marshals

¹ Kentucky, 13: 3.

and deputies could be set in motion for the recovery of slaves by the simple affidavit of ownership, and citizens were compelled, under penalty, to assist in the capture. The state constitutions, when not prohibiting emancipation, made compensation necessary. The southern constitutions protected slavery in many other ways. Residence was denied to free negroes in some states. The Committee for the District of Columbia reported: "In this district as in all the slave holding states in the union, the legal presumption is that persons of color going at large without any evidence of their freedom are absconding slaves and *prima facie* liable to all legal provisions applicable to that class of persons." Freemen suspected of being runaway slaves were sometimes sold as slaves.¹ Virginia (1856), Louisiana (1859), Maryland (1860) provided laws for the voluntary enslavement of free negroes.

The slave had no rights which the white man was bound to respect, certainly not the right to property, for his hut might be rifled with impunity of anything it contained, from waffles to wife. The civil code of Louisiana describes the negro slave:² "One who is in the power of a master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor. He can do nothing, possess nothing, nor acquire anything but what must belong to his master." He had no right to life. Not only were fugitives hunted down like wild beasts, flogged by any finder or shot down on the spot, but in some states the master was not answerable for murder. Thus in South Carolina punishing a slave to death was not a crime.³ The negro was deprived of various duties of citizenship, such as military service. Intermarriage of races was criminal — and un-

¹ Von Holst, *Constitutional History*, ii, p. 305.

² Art. 35.

³ Smith, Goldwin, *United States*, p. 51.

necessary. Education of slaves was frequently punished. Thus in Savannah it cost \$30 to teach a colored person "slave or free," and if the teacher were colored, it cost \$30 and thirty-nine strokes of the lash.¹ In Connecticut in 1833 Prudence Crandall for teaching negroes was put in prison in a cell previously occupied by a condemned criminal; and in 1835 a negro school in New Hampshire was razed to the ground.² A proper inculcation of the ethics of fear required that religious instruction should be under the surveillance of the masters. New York had found it impractical to forbid the enslavement of Christians (1665), and it was found that slaves might be baptized without freeing them. As a result of Nat Turner's rising in Virginia (1831) religious instruction was forbidden to negroes in Virginia.³ In 1852 Delaware forbade negroes to attend camp meetings or political meetings. Thus by trying to limit intelligence and sensibility it was sought to make these new tripods of Hephaestus completely serviceable. A South Carolina convention declared it more profitable for the masters to use up slaves in seven years as being the average capability of negroes imported from the breeding states.⁴ It is unnecessary to catalogue the horrors of slavery in evidence of the completeness of the property right. The most of them can be duplicated in the year 1907 in free countries by any one collecting horrors. Ichabod said: "We see it now in its true light and regard it as the most safe and stable basis for free institutions in the world."

As unrestricted liberty of private property always ends in concentration, so this form of property became concentrated. "Probably not more than one white man out of every five in the south was a slave holder; not more than

¹ Von Holst, *op. cit.*, vol. ii, p. 97. ² *Ibid.*, vol. ii, p. 98.

³ Lalor's *Cyclopaedia*, "Slavery." ⁴ Von Holst, *op. cit.*, i, p. 354.

half had even the use or direction of slaves.”¹ Thus General Wade Hampton had 5000 slaves and Senator Underwood, of Kentucky, had 8,743. The tendency of unhindered concentration of private property to develop a caste system, and so destroy the reality of the general liberty to property is shown in the fixed and unchanging economic conditions that prevailed for years in the south.

¹ Wilson, Woodrow, *United States*, iv, p. 197.

CHAPTER VI

LIBERTY TO OWN LAND IN AMERICA

ECONOMIC necessity may be a more efficient instrument of control than personal subjection. The Englishman who did not care to work came to America with the Englishman's intention of having freedom for himself at the expense of other men. America was material for estates. Queen Elizabeth, "of her own especial grace, certain science and meere motion" gave to Walter Raleigh and his "heires and assignees forever" "to discover, search, finde out and view such remote, heathen and barbarous lands, countries and territories not actually possessed of any Christian princes as to him his heires and assignees shall seem good and the same to have, holde, occupie and enjoy with all prerogatives, commodities, jurisdictions, royalties, franchises and pre-eminences thereto or thereabouts by sea and by land." Most of the early colonies suffered feudal landlords. In Virginia for a dozen years there was only Company land and feudal estates with the harshest servile tenure. New York belonged first to the Dutch West India Company; at a later time nominally to the Duke of York. In Maryland, Lord Baltimore was "supreme arbiter of the lives, fortunes and property of the people, the source of all honor, justice, religion, order and to a large degree of law itself." New Hampshire belonged to Mason and New Jersey to Berkeley and Carteret. George Carteret devised his "property," including East Jersey, to six trustees and three heirs.¹

¹ Hough's *American Constitutions*, vol. ii, p. 32.

Penn owned Pennsylvania and purchased Delaware from the Duke of York. North Carolina, South Carolina and Georgia were all held as proprietary colonies. The lands granted to colonists, whether to individual landlords or to communities, were not private property in the present sense. The first New England towns seem to have had a sort of Germanic house lot system, with a "normal amount of planting ground" allotted in various ways.¹ Thus the Salem villager was allowed a "ten acre lott and a house lott." This included widows, but "noe single maiden not disposed of in marriage, for it would be a bad president to keep house alone." Nearly all the New England towns had the English system of common fields to some extent.² As in village communities of other periods the inhabitants could not sell freely the portions possessed by them. Thus Connecticut declares (1659): "No inhabitant shall have power to make sale of his accomodation of house and lands until he have first propounded the sale thereof to the town where it is situate and they refuse to accept of the sale tendered."³ Providence did not allow a lot to be sold "but to an inhabitant," without consent of the town.⁴ In 1643 the General Court of Connecticut ordered that as the condition of the plantation required that much of the land should be improved in common, each town should, before the next meeting of the Court choose seven "able and discreet men to take the common lands belonging to ech of the seurall townes respectively into their serious and sad considera-

¹ Adams, *Village Communities of Cape Anne and Salem*, in *Johns Hopkins University Studies*, ix, p. 33.

² *Ibid.*, p. 37.

³ Eggleston, *Land System of the New England Colonies*, in *Johns Hopkins University Studies*, xi-xii, p. 49.

⁴ Weedon, *Economic History of New England*, i, p. 57.

tion.”¹ Village rights of common existed in the Dutch communities of New York. City Hall Park was once a village commons where the droves of cattle were sent morning and evening to pasture.² As extensive land-ownership is of no value without tenants, these manors were conferred as feudal estates for the transportation of servants, the proprietor reserving quit rents. In 1732, 2,500,000 acres had been engrossed in great grants in New York, while thirteen manorial grants alone in 1700 contained 700,000 acres.³ Penn granted land as socage tenements—as “of the manor” or as “of the seignior” —liable to quit rents of one shilling per hundred acres,⁴ and subsequently to rents varying in value from a peppercorn, a red rose, an Indian arrow, a buck’s foot, a beaver’s skin or a bushel of wheat to several shillings per hundred acres. In Maryland (1633-4) two thousand acres were given to every adventurer transporting five men servants.⁵ Thus George Talbott, of Castle Roover, Roscommon county, Ireland, transported six hundred and forty persons in twelve years thereby becoming lord of 32,000 acres in Cecil county.⁶ Captain George Evelinton, Lord of the Manor of Evelinton in St. Mary’s county, George Talbott, Lord of Susquehanna Manor in Cecil county, Giles Brent, Lord of Kent Fort, on Kent Island⁷ and other lords and ladies dispensed a sometimes straitened, sometimes lavish, but always lordly

¹ Mead, *Political Science Quarterly*, March, 1906.

² Elting, *Dutch Village Communities*, in *Johns Hopkins University Studies*, 4th Series, i, p. 25.

³ Ballagh, *American Historical Association Report*, 1897, p. 110.

⁴ Shepherd, *Land System of Pennsylvania*, in *Am. Hist. Assoc.*, 1895.

⁵ McCormac, *White Servitude in Maryland*, in *Johns Hopkins University Studies*, xxii, 1904, p. 16.

⁶ *Ibid.*, p. 21.

⁷ Johnson, John, *Old Maryland Manors*, pp. 8-9.

hospitality under the benediction of the ancestral portraits and the glamor of the carved wainscoting, or swept up the aisles of family chapels, between the slaves of the manor on one side and the tenants on the other. The live lord had his demesne lands,¹ fealties, escheats, rents and fines.² The dead lord had a vault in the chapel, while his retainers had graves outside marked with plain slabs or boards. The records of the court leet and court baron of St. Clement's Manor (1659-72) contain such entries as this: "We present that upon the death of Mr. Robte Sly there is a reliefe due to the lord & that Mr. Gerard Sly is his next heire who hath sworne fealty accordingly." ³

Virginia had some traces of the community system in its grants of commons and its great estates granted to favorites.⁴ The glories of these colonial lords were less short-lived than those of Locke's South Carolina landgraves, count palatines, and caciques with their dominion over freeholders and "*adscripti glebae*." But lords of provinces and lords of manors alike passed away—for a time at least. Although Maryland, Pennsylvania and Delaware remained nominally under such proprietorship until the Revolution, this property faded into hereditary claim on governmental privilege, such as the charter right to veto legislation. Berkeley sold West Jersey to John Fenwick in 1673 for \$1000.⁵ The country was too large for feudalism and the north was not adapted to large estates. The manorial lords lost their feudal privileges and became owners of free-

¹ McCormac, *op. cit.*, p. 13.

² Matthews *vs.* Ward, 10 Maryland, 443.

³ Johnson, *op. cit.*, p. 8.

⁴ Ingle, E., *Local Institutions in Virginia*, in *John Hopkins University Studies*, 3d Series, ii-iii.

⁵ Hough's *American Constitutions*, ii, p. 104.

holds. The Patroon estates were swept away, although the Rensselaerwyck manor did not terminate until 1839.¹ In 1767 twenty-seven Maryland manors of 100,000 acres were sold. In 1776 proprietary manors of 70,000 acres remained unsold. The Baltimores received nothing for their rights. Penn was given for private estates £500,000, while his general rights were confiscated.² Massachusetts had abolished feudal tenures in 1658.³ A Massachusetts magistrate had said: "The fundamental law which God's nature has given to the people cannot be infringed. The right of property is such a right."⁴ In 1793 New York partitioned the common tracts by act of the legislature.⁵ And although the humanitarian incorporators of Georgia had said that one person could not have more than fifty acres, and this in tail male, dissatisfaction with this limitation led to the recognition of the principle of absolute ownership in 1750.⁶ Thus political sovereignty had been detached as far as possible from the land before the Revolution. It was declared in a Massachusetts document: "The idea of a man born a magistrate, law giver or judge is absurd or unnatural."

But notwithstanding all the remnants of feudalism in America the prevalent tenure from the beginning was allodial. It was not like the free land ownership of early Teutonic times, if we assume there was such land-holding. It was not interdependent, but individual.

To show chronologically the alternation of liberty and limitation of the ownership of American realty is impos-

¹ Hough, *Constitutions*, ii, p. 57.

² Fiske, *Critical Period of American History*, p. 71.

³ Reinsch, *Common Law in the American Colonies*, p. 14.

⁴ *Ibid.*

⁵ Elting, *Dutch Village Communities*, p. 40.

⁶ Banks, *Land Tenure in Georgia*, p. 11.

sible. It will be attempted only to show the trend of the law towards distinct individual ownership and the concurrent necessity of social limitations. A period of legal limitations will not appear as clearly as in the case of slaves and of corporations. Indeed such a period of limitation has scarcely begun. The security of private property was already guaranteed under the common law and needed only the confirmation of our own political unity to give it the greatest possible stability. The Declaration of Independence contended for the inalienable rights of life, liberty and the pursuit of happiness, which was a contention against history. But since there is no semblance of liberty and only a semblance of life and no approach to a worthy happiness without economic independence, it must be supposed that the framers of that document had in mind the guarantee of ownership. At any rate the greatest internal hindrance to union was the economic rivalry and insecurity of the colonies. It was said in the Massachusetts Convention (1788) of Shay's Rebellion, "They would rob you of your property, threaten to burn your houses and oblige you to be on your guard night and day."¹ "In order to have this liberty it is requisite the government be so constituted as one man need not be afraid of another."² General Warren said: "That personal freedom is the natural right of every man and that property or an exclusive right to dispose of what he has honestly acquired by his own labor, necessarily arises therefrom are truths that common sense has placed beyond the reach of contradiction."³ Thomas Jefferson gave energetic attention to the destruction of primogenitures in Virginia, holding with Montesquieu, that the main object of

¹ Quoted in Hart, *Formation of the Union*, p. 113.

² Montesquieu, xi, 6.

³ Mellen, *On the Constitutionality of Slavery*, p. 35.

a legislator is to promote equality of fortunes, to restrain heritages, donations and doweries. The "general welfare" and the "blessings of liberty," professed as ends by the constitution, are equally with the Declaration of Independence, expressive of concessions and ideals rather than of reality. As seen already in the consideration of slavery it had little influence on economic evolution. The state constitutions make like declarations. Thus in twenty-seven states a man has a right to "pursue happiness." The amendments to the constitution are the expression of national desires for various things conceived as attributes of liberty. Thus a man's house is his castle and in it his property and his person are secure from illegal seizure or exactions.

Concession of rights to some is followed by the concession of similar rights to others of uncertain citizenship. Wives and aliens and slaves and Indians have successively gained in civil rights. At the beginning of the nineteenth century the husband still had a customary right to restrain and control his wife's action. By the common law the husband could take the rents and profits of his wife's land. He could grant it to some one else for the time of his life. It could be levied on for his debts, and a life estate could be given to the execution purchaser. If the land was not so conveyed and his wife died after having had a child by him, he was entitled to the land for life. If the land was sold and conveyed by deed made by both of them, the money or notes representing the consideration belonged to the husband exclusively.¹ Indeed the wife was all but his property. She might liken her position to that of her lord's redemptioners or his slaves. She was somewhat the strongest of the subject personalities and her liberty to a

¹ *American and English Encyclopedia of Law*, 2d Edition, xi, p. 817.

status corresponding to her husband's should therefore come first. The right to own precedes the right to vote as in the case of the negroes. The community idea, in which the husband was the lord gave way before the individual idea. The guardianship of unmarried women first disappeared. The common law contractual incapacity of married women was removed by the practice of the chancery courts in giving to her estate free from the common law rights of her husband and requiring the husband to support the wife and children. Early in the nineteenth century contractual rights were given to deserted wives.¹ Greater industrial activity secured to the wife the right to carry on business. She could secure separate property by contract or by the donation of a third party. She was secured by legislation an interest in her own industry. In almost all states at present the married woman has as much right over her property as the single woman. "The legislature shall pass such laws as may be necessary to protect the property of married women from the debts, liabilities and control of their husbands."² So far as the law can equalize the status within the conjugal unity it has done so.

The common law did not allow an alien to take by descent from an intestate ancestor. Although as recently as 1887 Congress enacted that aliens cannot hold lands in the territories or in the District of Columbia, at present in most of the states the rights of aliens are secured. Liberty to own property now belongs to any one who can get it.

Laws giving definiteness to individual ownership and disentangling it from partial claims increase the liberty and security of ownership. These legal developments for the most part going far back into English history, may be

¹ Loeb, I., *The Property Relations of Married Parties*, pp. 30-1.

² *West Virginia Constitution*, 1872, vi, 49.

loosely classified as liberties of possession, of use, of disposition.

I. Laws securing the possession of property concern: uses and trust; tenancy; disseizin; mortgages; forfeiture; fines; eminent domain; homestead.

II. Laws securing chiefly the use of property concern: malicious prosecution; easements; fences; tithes and offices.

III. Laws affecting chiefly the right of disposition concern: division; bequest; intestate succession; escheat; wills; fees; primogeniture; restraints on alienation; perpetuities; conveyancing and registration.

The divided ownership resulting from life estate and from uses and trusts are not common in America. They have been expressly abolished in some states.¹ Executory trusts are not as common in this country as in England.² Courts prefer to construe language as not creating conditions in estates. Rent charges created by a grant of rent, the owner retaining the entire land interest, common in England, are very rare in America.

When population overtakes economic opportunity the landlord's total ownership, or claim on other men is increased by the detachment of tenant right, by giving tenant's freedom without the conditions of freedom. The abandonment of feudal tenures has been shown already. At common law the covenant to pay rent was independent of the covenant on the part of the lessor. If the building burned the rent ran on, and non-payment of the rent did not end the tenancy. But now the landlord may regain his possession if the rent is not paid.³ The common law required six months' notice to relinquish tenancy, but now the land

¹ Stimson, *American Statute Law*, p. 233.

² Tiffany, *Real Property*, i, p. 238.

³ Beers, in *Two Centuries of American Law*, p. 58.

lord can regain possession in a few days. Definiteness of tenure is secured by limiting the terms of leases. Thus New York provided that "No lease or grant of agricultural land for a longer period than ten years hereafter made in which shall be reserved any rent or service of any kind shall be valid."¹ In Iowa the term is twenty years;² in Michigan twelve;³ and in Arkansas a lease for a longer period than twenty-one years is held a conveyance in fee to the lessee.⁴

Waste—such as unreasonable destruction of lumber, or the changing of the character of the land in a way not in accordance with the local custom, or by improper tillage, allowing unnecessary deterioration of an estate—is restrained by injunction, by damages, by penalty in some states of treble damages, sometimes by forfeiture. The procedure of the common law for the recovery of possession of real estate has been superseded by a single action of disseizin or ejectment.⁵

The ownership of land is less imperilled by mortgages. The holder of the "dead pledge" once took both the land and the revenues without applying them in satisfaction of his debts. The *vadium vivium* enabled the borrower to keep both the use and the possession of the land. Then the lender first got an estate upon condition of failure to redeem; later an absolute conveyance with agreement to reconvey on payment of debt at a fixed time.⁶ So the borrower sometimes lost his land for a small debt. In the time of James I the mortgagor obtained the right to maintain a bill in equity to redeem even after default until cut off by foreclosure and parties to the mortgage were not allowed to

¹ Constitution, i, 13.

² Cons., i, 24.

³ Cons., viii, 12.

⁴ Cons., i, 24.

⁵ Watrous, in *Two Centuries of Am. Law*, p. 88.

⁶ *Am. and Eng. Enc. of Law*, "Mortgages."

redeem. In 1737 Lord Hardwicke decided that the mortgagor was the owner and the land was only security. In the colonies the mortgagee held title only against the mortgagor, whereas formerly he held against the world. In most of the states the equitable theory that the mortgage is only a security prevailed. Legal rights are abrogated by statute in some states and are rarely asserted in those states holding most nearly to the old legal theory. This change coincides with the general gain in liberty of ownership. Thus statutes were enacted in South Carolina in 1791; in New York in 1828; in Michigan and Indiana in 1843; in Iowa in 1850; in Kentucky in 1889. The methods of foreclosure have accordingly become less destructive of ownership. Under the theory that the mortgagee was the owner strict foreclosure was the rule. Now it is becoming obsolete. It is the rule only in Connecticut and Vermont and occurs rarely in a few other states.¹ Now on the theory that the mortgage is a lien, the usual method is by a suit in equity for a sale of the land, the sale to be conducted in a way prescribed by statute.² "Recent legislation in regard to real estate mortgages seems to be concerned chiefly with the best way to release them."³ In Kansas (1903) in case of the mortgagee's death, a mortgage may be released by his executor or administrator during the period of administration and afterward by his heirs or devisees. In Minnesota (1903) a mortgage running to a corporation may be released by its president or vice-president, attested by the secretary or treasurer.³

Forfeitures for felony, once the rule, have been abrogated by statute. The constitutions of the United States and of the states prohibit "excessive fines."

¹ Gager, in *Two Centuries of Am. Law*, "Mortgages," *passim*.

² Tiffany, *op. cit.*, ii, p. 1260.

³ *N. Y. Library Bul. of Legislation*, 22 (c6).

Some of the earlier state constitutions did not secure compensation for property taken by condemnation under the power of eminent domain. All do so now, and some go further, requiring prepayment of compensation.¹ Some states make an attempt to purchase the land a condition precedent to condemnation.² The right can be exercised by corporations only by express grant or necessary implication, and the property can be used only for the purpose for which the power was granted.³ There is a tendency to greater liberality in the payment of damages "arising as a consequent of taking" than formerly. "There has been a tendency to restrict more and more the manner of exercising the power."⁴

During the latter half of the nineteenth century homestead exemption laws became common. By these an amount of property deemed necessary for personal comfort was secured to its owner against attachment or execution by creditors. Thus the Georgia constitution of 1868⁵ secured realty to the value of \$2000 and personal property to the value of \$1000 against all judgments, decrees or executions, except for taxes, or money borrowed and spent in the improvement of the homestead or for purchase money of the same or labor or material on the property.

The right of action for malicious prosecution has been extended to include civil cases where exceptional injury has been done through groundless charges of insanity, bankruptcy and the like.⁶

Greater distinctness of private rights is shown in the

¹ *Am. and Eng. Enc. of Law*, x, p. 1050.

² *Ibid.*, x, p. 1054.

³ *Ibid.*, x, p. 1055.

⁴ *Ibid.*, 1050.

⁵ VIII, i, one.

⁶ Watrous, in *Two Centuries of American Law*, p. 91.

American attitude to certain forms of easement recognized in England. There the right to have light and air pass over the land of a neighbor unobstructed by any erection upon such land may be acquired by prescription from the mere fact that for a number of years there has been such unobstructed passage. The right to have lateral support of buildings may be acquired in the same way. A neighbor who excavates may be restrained by injunction or he may be liable for damages. In American use these rights have been generally disallowed.¹

Advowsons, tithes, dignities and offices are no longer attached to realty.

Greater freedom of the right of disposition has been secured in laws concerning division. It was once hard to divide a joint estate. Division could be effected only by mutual conveyance with pecuniary compensation for inequality, or by charges upon land by means of easements. A sale of division could be made only by agreement of all the parties.² Now the courts secure unqualified right to sell.

Once intestate succession was the only kind of succession when the eldest son was born with responsibility for the peace of the ancestral soul. Intestate succession of children has become certain and a child brought up in the enjoyment of property is assured a continuance of it.

Property of bastards and aliens no longer escheats as formerly. There is no escheat to lords. Heirs are protected from escheat by the provision that a certain period shall be allowed within which persons claiming to be heirs may establish their title to property.

In nothing is the greater freedom of modern ownership

¹ Beers, in *Two Centuries of Am. Law*, p. 60.

² Pomeroy, *Equity Jurisprudence*, iii, p. 2132.

more apparent than in the law of wills. The law secures an owner the right to dispose of his property as he pleases and to do it secretly. Greater freedom has been allowed in the right of bequests to corporations and charities and the like. The Wills Act of 1837 allowed the testator to dispose of all property that might yet be acquired before his death. The intention of the testator is sought. If a disposition of a testator becomes invalid after his death it is still sought to apply the property as nearly as possible according to the will of the testator. If there appears an intention on the part of the testator that the conversion take place not only for the purposes named in the will, but for all purposes whatever, such an intention, it is said is more easily and readily inferred in this country than in England.¹ Some states validate the written or oral will of the testator. Mere assent or incidental reference to a will is sufficient publication."² In New York, in Massachusetts and in other states wills may be deposited for safe keeping. The tendency is to make all rights of action and executory and future interests devisable.³

It is evident that the right of disposition must be limited in future time in order that it may be as unlimited in extent in the future as it is now. Only a live owner can own. Fees tail and primogeniture, having limited the power of bequest and the liberty of property, have disappeared. Fees tail have been abolished by statute in some states. The devisee's estate has been turned into a fee simple wherever possible.⁴ In other states the estate of the donee is turned into a life estate, providing that the one who shall suc-

¹ Tiffany, *op. cit.*, i, p. 263.

² *Ibid.*, ii, p. 946.

³ Daggett, in *Two Centuries of American Law*, p. 177.

⁴ Tiffany, *op. cit.*, i, p. 50.

ceed him shall take absolutely.¹ Primogeniture was recognized in some of the colonies: thus by Rhode Island until 1770; by Maryland until 1715; by Pennsylvania until 1683; by New Jersey, New York, Virginia, South Carolina and Georgia until 1776, while in Massachusetts, Connecticut and Delaware the oldest son had a double portion.² When Pendleton of Virginia implored Jefferson to let the oldest son have a double portion, he said: "No, not till he can eat a double portion of food and do a double allowance of work."

Restrictions of mortmain seek to preserve private property. "The laws of the different states show a distinct policy to prevent an undue accumulation of property and especially of land."³ Thus Mississippi forbids entirely devises of lands or interests for religious or charitable purposes. Some states limit the total amount of land that may be held by a corporation.

The right to alienate is an essential of private property. Accordingly property cannot be transferred so as to prevent the alienation by the new owner. It cannot be transferred free of the liabilities of the beneficiary; alienation to particular persons cannot be forbidden by the grantor; nor can alienation except to particular persons be prohibited; nor can the grantee be restrained from selling without offering first to some particular person; nor from alienating otherwise except by will; nor from alienating except to specified persons; fines and quarter sales are void; the grantee cannot be forbidden to sell without paying a sum of money to the grantor.

Even a debtor has a general right to dispose of property,

¹ Beers, in *Two Centuries of American Law*, p. 55.

² Daggett, in *Two Centuries of American Law*, p. 186.

³ Freund, *The Police Power*, p. 375.

according to his own judgment and if he acts in good faith a creditor has no right to complain.¹ He may even transfer for an inadequate consideration, or in preference of his own family as creditors, or for reasonable payments for life insurance for the benefit of his own family.²

A perpetuity—"an estate inalienable though all men join in the conveyance" is an impossibility. Like restraints on alienation in general, it has gradually been limited. "The purpose of the rule against perpetuities is to facilitate the alienation of property by prohibiting the clogging of the title with future interests dependent on contingencies that may not arise at all or until a remote period."³ Thus value is not depreciated by contingency. Since the aim of the rule is the greatest liberty of owners, the period of vesting has been extended to a time, destructive neither of the owner's present right of disposition nor of the integrity of remote ownership. The period is not invariable, being usually a life in being and twenty-one years thereafter; some times two lives and twenty-one years.

Methods of conveyancing have come into use which make disposition less cumbersome than formerly. Feoffment, "livery of seisin" is obsolete, disposed of in some states by statute. There are but two simple forms of deed in common use—the warranty deed and the quitclaim deed. Statutes set forth short forms of these deeds. Seals are no longer of importance. Witnesses are unnecessary. These simple conveyances are sufficient to pass fee simple, or absolutely heritable estate. A conveyance intended to take effect as a certain kind of conveyance, if not valid for that purpose, will if possible be construed as a conveyance of another character in order that it may take effect. The

¹ *Am. and Eng. Enc. of Law*, xiv, p. 224.

² *Ibid.*, xiv, p. 243.

³ *Tiffany, op. cit.*, i, p. 245.

English sought to avoid publicity of transfer. Systems of registration have been common in America, with provisions that certified copies of the records shall be admissible in evidence and that unrecorded deeds shall be of no effect against subsequent purchasers without actual notice. When land has been registered a certificate of title is made out and kept in the office of the register and a duplicate given to the owner. The deeds made subsequently, instead of passing title operate only as contracts to convey and as authority to the registrar to transfer the title. The transfer itself is effected by the surrender of the duplicate certificate of title and the issuing of a new certificate to the transferee. Transfers by descent, devise or judicial process are made by the registrar on the authority of the court having jurisdiction. Transfer is facilitated throughout the west by the rectangular land survey system.

The land policy of the government has fostered private property. From 1784 to 1801 land was sold by the government in large quantities by special contracts. From 1800 to 1820, 18,000,000 acres were sold in small lots on credit. In the next twenty years 76,000,000 acres in lots to suit purchasers were sold for cash. After 1837 by the pre-emption system the most desirable lands were reserved for actual settlement at a low price. Under the homestead system (1862), and the timber culture act (1873) 150,000,000 acres have passed into private hands. Since 1880 sales have averaged 4,000,000 acres yearly. The minimum price of ordinary lands has been for many years \$1.25 an acre. The new states have been granted 25,500,000 acres for internal improvements, 500,000,000 acres of saline lands, 68,000,000 acres for school purposes, 1,000,000 acres for universities and 10,000,000 acres for agricultural colleges. 23,000,000 acres were granted to new states in 1890-1, and 50,000,000

acres to railroads before 1873.¹ The total amount of public lands passing into private ownership between 1898 and 1905 was 51,917,215.15 acres.²

The multiplication and complexity of the laws defining and protecting the individual right in property indicate the extreme of the prevalence of the conception of private property, while on the other hand they emphasize the dependence of such property on the social sanction. "The payment of a debt cannot be enforced against the government by a suit, but claims against it are none the less legal or equitable on that account."³

In illustration of the recent definition given to private property may be cited the special laws of Kentucky (1892) and New York (1903) for the protection of ginseng gardens from burglary.⁴ Thirteen states passed laws relating to interference with electric wires, or the diversion of electric currents. Florida (1903) increased the penalty for malicious injury to fences to a possible ten years imprisonment and \$10,000 fine.⁴ Minnesota punishes the thief who sweeps any railroad car while in transit or standing on any railroad track in the state.⁵

The extreme conception of liberty to own was expressed by John Quincy Adams:⁶ "The moment that the idea is admitted into society that property is not as sacred as the laws of God, anarchy and tyranny begin." The American liberty to own land as nearly as possible as a chattel is the most complete in history.

¹ See Hart, in Bullock's *Readings in Finance*, pp. 64-9.

² *Congressional Record*, June 27, 1906, p. 9574.

³ *Emerson vs. Hall*, 13 Peters (U. S.), 412.

⁴ *N. Y. Lib. Bul. of Leg.*, 87, d18.

⁵ *N. Y. Library Bulletin of Legislation*, 87, d18-20.

⁶ Quoted in Willoughby, *Rights and Duties of American Citizenship*, p. 65.

CHAPTER VII

LIBERTY TO OWN CORPORATE PROPERTY IN AMERICA

INDUSTRY and commerce being of a more evidently public nature than slaves and land were more slowly reduced to private property. American enterprise was harassed and repressed by the British mercantile theory, of buying nothing and selling everything. Thus in 1631 an export duty of 3s. 4d. was put on every piece of woollen broadcloth.¹ The colonists themselves limited commercial freedom. Thus the Massachusetts Laws of 1649 show regulations of prices and rates of interest, and as late as 1777 an elaborate tariff of charges for labor and merchandise was enacted for Boston, although it was soon repealed.²

Liberty increased in the form of lawlessness in the long continued evasion of the navigation acts by which the colonies were excluded from the carrying trade. Thus in 1700 one-third of the trade of New York and Boston was in violation of the law. Writs of assistance and the like served only to make liberty lawful.

Before there could be real liberty in the ownership of trade and industry, there must be a stable national unity to guarantee freedom from foreign aggression and end the commercial wars at home, which caused Washington to say: "We are one nation today and thirteen tomorrow. Who will treat with us on these terms." The "more per-

¹ Wright, *Industrial Evolution of the U. S.*, p. 7.

² Freund, *The Police Power*, p. 384.

fect union " and the constitutional power of Congress to regulate commerce, and the decisions of the courts sustaining the sovereignty of the United States secured such unity.

The increase of machinery and population and the resulting interdependence and intricacy of relations in associative production and ownership developed a form of exchangeable representatives of individual relations. This capitalization of status appears in the enormous extension of credit and in the shares of corporations. In 1904 there was \$3,908,509,152 of deposit currency,¹ which was a sum greater than the coinage of the mints of the United States from 1792 to 1897.

The mere partnership in which each partner was bound for the entire indebtedness and which was dissolved by death of a partner was inadequate for the large enterprise necessary to commercial development. Industry was developed by the device of an artificial person with larger powers and smaller responsibilities than individuals and with larger economic responsibilities and smaller powers than the state. "As touching corporations the opinion of Manwood, chief baron was this that they were invisible, immortal, having no conscience or soul and that therefore no subpoena lieth against them, they cannot speak, nor appear in person but by attorney." Nevertheless this corporation is an institution whose profits accrue to individuals. The fiction of a corporate entity has served chiefly as a cloak of innocence. "The fact must be constantly kept in review that the metaphysical entity has no thought or will of its own, that an act ascribed to it emanates from and is the act of individuals personified by it."² Since these corporations are "artificial, intangible invisible and existing only in contemplation

¹ *Statistical Abstract*, 1905, p. 114.

² 49 Ohio, 137, cited by Horack, *Industrial Corporations*, p. 15.

of the law,"¹ and thus are more clearly creatures of the state than landed property, and since they are more evidently "affected with a public interest," it has not been possible for ownership in them to grow into such private property as has been conceded to mere physical possession. But a series of liberties to own corporate shares has approximated them to private property. Before the right to share in the management of corporate enterprise could be conceded to any man with capital to invest, political prerogatives must be diminished. Earlier corporations were distinctively municipal. Jealousy of the prerogatives of government led England to oppose the exercise of political corporate functions by the colonists and to insist that the colonies had never been public governments. The necessity of granting municipal corporate powers and charters to religious bodies led Massachusetts to the incorporation of Harvard College in 1650, but upon the restoration of the king this act was punished as an invasion of the rights of the crown. The same jealousy of corporate powers, through their experience with proprietary government caused the colonists themselves to oppose charters. This jealousy also led Parliament in 1741 to forbid incorporation for business purposes. Up to that time there had been but three such incorporations. Connecticut (1732) gave a perpetual charter to a "society for promoting and carrying on trade and commerce with any of his majesty's dominions and for encouraging the fishery, etc., as well for the common good as for their own private interest." This institution became a bank, inflated the currency and was suspended "as not for the peace and health of the government."² In 1688 a petition was presented to the crown for a charter of incorpo-

¹ Marshall, quoted in Small, *Am. Journal of Sociology*, i, p. 398.

² Baldwin, *Modern Political Institutions*, p. 185.

ation for a trading company with authority to open mines in New England. The colonists opposed this as a monopoly and an intrenchment on the field of government.¹ The large aggregations of capital necessary for commerce were under the management of joint stock companies, even after the adoption of the constitution. Two-thirds of the early corporations were quasi-public. Out of a total of perhaps 225 corporations before 1800, only six were for commerce and only twelve were for manufacturing.² As long as little distinction was made among the kinds of corporations, industrial incorporation was difficult. It was not thought safe to permit perpetual possession in a political organization with obligations distinct from that of its members. "Men who are honest separately, conjunctively are hard-hearted, determined villains."³ And indeed the social sovereignty in commercial corporations differs from that of purely political corporations in a democracy chiefly in being less democratic in its aims and in its government, since it substitutes private for public ends and is governed not by the theoretical personal majority of political democracy, but by a stock majority. The early jealousy seems to be not without present justification in the conduct of corporations.

Of business companies before 1800 twenty-eight were banks and twenty-five were insurance companies. They are perhaps distinguishable from other corporations in that their extension involves extension of property in them to all with whom they do business. In time other corporations were seen to be of mutual benefit. In any case the increasing freedom of contract, the existence of nearly two thousand public quasi-corporations and public municipal cor-

¹ Baldwin, in *Two Centuries of American Law*, p. 270.

² *Ibid.*, p. 212.

³ Lord Bathurst, quoted in Baldwin, *Mod. Polit. Inst.*, p. 171.

porations, religious societies and the like and the change in transportation methods, together with increasing social interdependence and increasing population, caused the rapid development of corporations.

Political prerogative was diminished by the early establishment—contrary to English law—of the theory that a corporation can do only what it is chartered to do.

The universal substitution of general laws of incorporation for the earlier special grants of charters was the work of the same half century in which the rights of ownership of slaves and of land became most free. The first general incorporation law was that of New York in 1784 for the formation of ecclesiastical societies.¹ All but six state constitutions now guarantee the formation of corporations under general laws. The others have general laws, but pass in addition special acts. Corporations can be formed in a day as readily as partnerships.

Security of corporate ownership was given by the judicial interpretation of a charter as a contract. "In England a private as well as a public corporation may be dissolved by act of Parliament, but in the United States . . . the charter of a quasi-public or a private corporation is . . . within the protection of that clause of the constitution of the United States, which forbids a state from passing any law impairing the obligation of contracts."²

Both American social philosophy and law encouraged the the rapid extension of corporations. The prevailing individualistic philosophy which now opposes the freedom of corporate power, long supported this non-individualistic form of ownership and there was before the Civil War little opposition to monopoly. The country was agricultural.

¹ Baldwin, *Mod. Polit. Insts.*, p. 174.

² Dartmouth College Case, 4 Wheaton, 518.

Monopoly was not perceived. Competition existed and was even supposed to be the cause of progress. Governmental encouragement by tariffs and bounties, inspired by the individualistic spirit was freely given to corporations. Thus during thirty-five years before the Union Pacific railway was completed, the government gave to road, canal and railroad corporations public lands equal to the thirteen original states as they now stand.¹ The belief that shares in such corporations are as much private property as any other form of ownership has often been legally expressed. Of even the most public form of corporate property the New York Constitution says: "A street railroad franchise is 'property' in the highest sense of the term and not a mere license or privilege revocable at the will of the state."

The law of corporations is a development of the last sixty years. Thus coupon bonds are not mentioned in Parsons on Notes and Bills in 1860.² The law seeks to define stocks as private property. Formerly on the dissolution of a corporation, debts to and from it were forgiven and its personal property went to the state.³ Minority stockholders formerly had inadequate remedy against fraud by directors, but now simple stockholders may institute suit.⁴ Courts of equity protect the minority from fraud by the majority as where the majority has an interest in two corporations contracting with each other.⁵ The majority cannot bind the minority to an act outside of the chartered powers.⁶ The law forbids directors to expel a stockholder.⁷ It is well settled that any stockholder may inspect the books and papers of a corporation for proper purposes and at proper

¹ Montgomery, *Leading Facts in U. S. History*, p. 345.

² Cook, *On Corporations*, p. 720.

³ *Ibid.*, p. 729.

⁴ Clark, *Law of Private Corporations*, p. 389. Cook, *op. cit.*, p. 765.

⁵ Cook, *op. cit.*, p. 710.

⁶ Clark, *op. cit.*, p. 445.

⁷ Cook, *op. cit.*, p. 23.

times.¹ The common law gave but one vote to each shareholder, but now a vote is given to each share.² The right of disposition is absolute. The rights of private corporations have been fortified by the Fourteenth Amendment and the decisions of the Supreme Court that they are persons within the significance of that amendment and hence entitled to the full benefit of its guarantees against deprivation by authority of any state of property without due process of law or denial by any state of the equal protection of its laws. Under this amendment corporations can claim all of the rights and exercise more than the immunities of private citizens. A corporation is a sort of commercial over-soul, into which its members may ascend for immunity, and from which they may descend for benefits other than spiritual, "pleading the rights of natural persons on the one hand and setting up the privileges of artificiality on the other to escape responsibility."³ Thus they sustain their ancient character as the *persona ficta* of Innocent IV, who vested titles of land in a saint for mortal use, the church being the guardian.

The corporate liberty to contract freely has been limited very reluctantly by the courts and many contracts in restraint of trade have been upheld. Thus an association agreeing not to deal with those violating its agreement was upheld in the English case, *Mogul Steamship Company vs. McGregor Gow & Company* which has been followed in some cases in this country. Thus an Illinois court refused to compel admission to membership in a live-stock exchange or to enjoin the exchange from notifying its members not to deal with the plaintiff.⁴ This of course while upholding

¹ Clark, *op. cit.*, p. 336.

² *Ibid.*, p. 473.

³ Horack, *Industrial Corporations*, p. 9.

⁴ *Am. Live Stock Com. Co. vs. Chicago Live Stock Exch.*, 143 Ill., 210. Freund, *op. cit.*, p. 339.

the rights of private property tended in fact to undermine its possibility. Similar agreements have been held not to be illegal under the federal anti-trust law. The courts have sustained sales with provisions for maintaining prices or for the exclusive handling of goods.¹ An agreement of a vendor of a business not to engage in the same business has been held to be not unreasonable.² The line of demarcation between decisions condemning and those upholding such contracts seems to waver between the principle of private property in business and the limitation necessary to prevent it from being oppressive. Indeed all of the mass of decisions and statutes in restriction of corporate liberty which will later be referred to as limitations of ownership need also to be considered here as efforts to preserve liberty of private property, since this inspires most of them.

Notwithstanding the frequent and sustained prescription of rates in many businesses "affected with a public interest" and having legal or actual monopoly, legislative and judicial sentiment has opposed general regulation of charges. The Court of Appeals of New York said that no power resided in the legislature to regulate private business, "prescribe the conditions under which it should be conducted, fix the price of commodities or services or interfere with the freedom of contract, and that the merchant, manufacturer, artisan and laborer are under our system of government left to pursue their way untrammelled by burdensome and restrictive regulation, which however common in rude and irregular times, are inconsistent with constitutional liberty."³ "The legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but

¹ Freund, p. 340.

² *Ibid.*, p. 343.

³ *People vs. Budd*, 117 N. Y., 1. Freund, *op. cit.*, p. 388.

otherwise may legislate with respect to corporations, whether expressly permitted to do so or not.”¹

The liberty to own having been guaranteed by general laws, everything possible has been done by the states to aid corporations in the exercise of the rights of private property. Certain states vie with each other in laws giving as little liability and as much secrecy as possible. In twenty-five states only three persons are required for an incorporation. In Nebraska, “persons desiring” may incorporate. In Iowa one man may elevate himself into an “artificial, invisible and immortal commercial entity.”² Voting trusts, by which the majority owners can concentrate the management have been sustained. Freedom to “water stock” has been secured in some states. Thus New Jersey and Delaware say that “in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive.”³ The secretary of state of Maine sent out circulars stating that corporators might incorporate originally, or increase their capital to an unlimited amount and issue stock for property or services, and the judgment of the directors as to the value of such property or services is conclusive, the stock thereupon becoming fully paid. Incorporation might be completed in three days; no part of the capital need be paid in before commencing business; business might be done anywhere in the world; persons not residents of the state might be elected as directors, or to any other office (save clerk); the corporation might create preferred, common or any other class of stock and regulate the voting power; might change the par value of their shares; might purchase and sell the stocks of other corporations; might validate meetings defectively

¹ L. & N. Railroad Co. *vs.* Ky., 161 U. S., 677. Freund, *op. cit.*, p. 367.

² Horack, *op. cit.*, p. 29.

³ *Ibid.*, p. 71.

called, by written consent thereto, in person or by proxy; need not file lists of stockholders.¹ Some states do not limit the amount of the capitalization. The "corporation states" aid consolidation by allowing corporations to own the stock of other corporations. With these possibilities of incorporation in some states and the constitutional right to engage in business in any state, with power to sue in the federal courts as a citizen of the state in which it was incorporated, the state in which it exists, it is inconceivable that corporate ownership could be freer than it is.

So great liberty has been attained in the capitalization of relations that it has been charged, whether justly or not, that one-half of the capitalization of railroads originally represented nothing tangible, is in effect "capitalized extortion." Thus also the American tin-plate companies with a total capitalization of from \$3,000,000 to \$4,000,000 became the American Tin Plate Company with a capital of \$50,000,000. The preferred stock (\$20,000,000) sold at 95. The promoters got \$4,000,000.² Above the \$5,000,000 original capital, what was it that was owned? Thirty-nine of the trusts mentioned in the Report of the Industrial Commission had property worth 64.42% of the nominal capitalization.³ It is the relation, the command over men, the earning power—and sometimes the power to deceive—that are salable. The value of such ownership is in the ability to make the service control the patronage. Moreover the control of 60,000 laborers exercised by a corporation like the Standard Oil is a social sovereignty; and this virtual ownership of its servants is essential to property in industrial opportunity. The kinship of these laborers to those of other

¹ Horack, *op. cit.*, p. 160.

² McVey, in Ripley, *Trusts, Pools and Corporations*, p. 313.

³ Ripley, p. 123.

ages is shown in the traces of slavery in the law of master and servant and of principal and agent. "The status of the servant maintains many of the marks of the time when he was a slave."¹ The liability of the master for his torts is one instance. The survival of the individualistic idea of freedom of contract secures this sovereignty. Political domination by corporations is all but the rule in America. Of twenty-six suits brought under the Sherman Anti-Trust Law ten were won by the government, four of these being against laborers.²

This power is not infrequently exercised as freedom from either political or economic responsibility. Attorney General Knox said to a committee of the United States Senate:³ "The officers or agents of such incorporated company, who grant the rebate or make the unlawful concession in rates are subject to indictment or punishment. That however is generally an impracticable remedy, because the agent who makes the concession is generally the only person by whom it can be ascertained that the rebate has been paid; and when he has testified in relation to the matter, he has thereby obtained amnesty from prosecution." Thus the officials of the "Beef Trust" recently escaped penalty on the ground that testimony given by themselves entitled them to immunity. Such superiority to the powers of government illustrates the extreme of freedom of property. The ability of the chiefs of corporations to substitute agents for themselves in matters at law seems to support the definition of ownership as a control of men rather than of objects.

Courts have declared against boycotts of any business. Statutes explicitly say that a combination of persons may

¹ Holmes, *Common Law*, p. 228.

² Moody, *Truth about the Trusts*, p. 498.

³ Ripley, *op. cit.*, p. 284.

not agree "not to patronize; trade or do business with any such individual, firm or corporation, or to induce others not to so patronize, trade or do business with any such individual, firm or corporation."¹ Thus a sort of property right in patronage is secured. This is protected also by statutes against unlawful conspiracy, threats, coercion and intimidation. Acts inimical to ownership may also be restrained by injunction of the courts. Violations of injunctions are in contempt of court, and make possible punishment without prescribed penalties or jury. This instrument has been more used in the last ten years than ever before. In 1894 by the Debs injunction "interference with a large number of the most important railroads of the country, or with trains engaged in interstate commerce or carrying the mails" was prohibited. This injunction also prohibited all persons from compelling, or inducing by threats, persuasion or intimidation any of the employes of the railroads to refuse to perform their duties or to quit employment, and prohibited almost as broadly efforts to prevent persons from entering employment."² In this way have been prohibited boycotts, picketing or strikes and in one or two instances the paying of strike benefits by labor unions.³ "Freedom of contract" tends to secure the *jus abutendi*. American employers are less liable for damages than those of England. It must be established that the owner's negligence was responsible for the injury. "Fellow employes'" negligence releases employers from common law liability and cuts off the larger number from redress for injury.⁴

The natural result of liberty is excess. Competition led to the success of the stronger and then to concentration of

¹ *Colorado Acts of 1897*, ch. 31, sec. 3.

² *Ind. Com. Rep.*, xix, p. 933.

³ *Ibid.*, xix, p. 886.

⁴ *Ind. Com. Report*, xix, p. 933.

management under the stronger. The present regimentation of industry is at once the completion of liberty and the chief force in its limitation. Thus competition was the ruin of many whiskey dealers. In 1882 the Western Exporters' Association prorated production among the dealers according to demand, allowing each to work only from 28% to 40% of its capacity. In the seventies the overproduction of oil led to informal agreements of the producers, limiting competition, receiving concessions from the railroads in return for aiding the pooling of the railroads to prevent their insolvency through competition. Other industries were pooled. Pools soon dissolved, however, through having no more substantial support than commercial honor, through shortsighted extortion and through legal opposition. In 1882 the oil producers organized the first "trust," by which nine trustees received in trust an assignment of the stock of the parties with voting powers. This was followed by eighty distilleries of which all but twelve were closed; then by the Sugar Refineries Company. Legal opposition destroyed the trust, but did not destroy the established harmony of management. In 1892 Standard Oil being dissolved, the holders of trust certificates received proportionate shares in each of the twenty constituent companies, establishing "community of interests," under the management of nine men. This sufficed for seven years. The railroads also used this device. But "community of interest" being precarious, the reorganization of these companies as single corporations was necessary. Thus in 1890 the Distillers and Cattle Feeders' trust was incorporated in Illinois as the American Distilling and Cattle Feeding Company with \$35,000,000 capital. Without the necessity of complete absorption of the constituent companies, "holding corporations" were invented, by which not an "illegal conspiracy" of several persons or corporations, as in the

"trust," but a single corporation holds a voting majority of the shares of several corporations. This was made lawful in 1889 in New Jersey and was sustained by the Supreme Court.¹

The movement belongs to the latter part of the nineteenth century. From 1860 to 1887 there were but six of the industrial concerns of the magnitude now known as trusts. Sixty-three trusts had been organized before 1897. In three years 183 trusts in all branches of industry were organized with a capital of over \$4,000,000,000. Thus while in 1860 there were 2,116 agricultural machinery plants with an average capital of \$6,500, eight employes and an annual product value of \$9,800, now there are 715 with an average capital of \$220,000, 65 employes and an annual product of \$147,000. The United States Steel Company was organized in 1901 with a capital of \$1,404,000,000. The Illinois Central Railroad with seven hundred miles was at one time one of the greatest roads in the world. In the next twenty years five thousand mile systems were developed. From 1890 to 1898 these grew to ten thousand mile systems. These have given space to twenty-five and fifty thousand mile systems. It is said that two groups of financiers rule the country industrially. This concentration, with its attendant political influence and its appropriation to private ends, at once shows the extreme of liberty of property and the most potent limitation of that liberty to many owners and ultimately, of course, to those exercising monopoly.

Ownership in America was freer in all forms than in England through the application of the growing English liberty, law and custom to a less limited land. Definiteness was given to liberty by the unity of American governments. Direct ownership reached its greatest attainable

¹ U. S. *vs.* E. C. Knight Co., 156 U. S., 1 (1895).

freedom in slavery. Land is as nearly as possible a chattel, free from the claims of struggling neighbors and commanding their services, and more sacred from trespass than person is from assault. Ownership in corporations has been given the greatest liberty possible in an associated form of ownership, and the number of corporations has grown from almost none at the adoption of the constitution to about 50,000, controlling four-fifths of the industry of the country.¹ This liberty and power of property is the greatest in history and has marked the time of our industrial development, of unconfined activity, of Spencerian "disintegration," or freedom of the parts, through looseness of the mass.

¹ Baldwin, *Modern Political Institutions*, p. 62.

CHAPTER VIII

LIMITATION OF SLAVE OWNERSHIP

POSSIBLY an examination of the conditions of ownership in America will disclose at least the beginning of a period of limitation of ownership in its completest form.

The result of the civil war was at once the culmination of the unity necessary to national guarantee of liberty of property and the effectual limitation of the first form of that liberty. Early abortive opposition to slavery has been referred to. It is not possible to assign its actual influence to the common provision of jury trials for negroes, and such provisions as that of North Carolina (1834) in giving the slave a right to protect himself from murderous assault by his master. All the states punished inhumanity to slaves, just as cruelty to animals is a crime, thus limiting *jus abutendi*.

Ownership of no kind was ever long unquestioned save in despotisms. From the time of the Quaker societies in Pennsylvania with their petitions, their "unconstitutional requests," odious to the south, the abolition movement grew. Early societies were the New York Society for Promoting the Manumission of Slaves in 1797 and the American Colonization Society in 1816. A Virginia legislator said after the uprising of Nat Turner (1831): "Spare us the curse of slavery, that bitterest drop from the chalice of the destroying angel." It is customary to disparage the abolitionists. But whatever their influence, dragging Garrison by the neck did not choke the sentiment, nor did

Georgia's offer of \$5,000 reward to any one who should bring him to Georgia to be judged according to its law increase the prestige of man stealing. The murder of Lovejoy by the "saviors of organic institutions" did not stifle agitation. Gag rules in Congress failed to stifle petition or to silence John Quincy Adams.

Governmental agencies were not wanting for the violation of the fugitive slave law. The underground railway was protected in the same way as the over-sea slave trade had been, in spite of the law. Various states passed "personal liberty laws" to defeat the fugitive slave laws and to protect free negroes from kidnappers. Thus Indiana, New York, Connecticut and Vermont provided jury trial for the fugitives and fined officials of the state for assisting in fugitive slave cases. In 1837 Ed. Prigg, attorney, sent Margaret Morgan back from Pennsylvania to her mistress in Maryland five years after her escape. This conflicted with a law of Pennsylvania of 1826 forbidding the taking of negroes out of the state for enslavement. The United States Supreme Court (1842) announced that the fugitive slave law of 1793 could be carried out by national authority alone.¹ This made a dead letter of the old law. Massachusetts (1843), Vermont (1843), Pennsylvania (1848), Connecticut (1846) prohibited state officers from assisting in such cases and forbade the use of state jails. The second and more severe fugitive slave law of 1850 caused more "personal liberty bills," by which judges were forbidden to take cognizance, the writ of habeas corpus was employed, jury trial was secured, the use of jails was forbidden and attorneys were provided for the fugitives. In answer to the demand of the governor of Virginia for the return of slaves the governor of New York replied that no state could

¹ 16 Peters, 68.

demand the return of a fugitive from justice for an act which was criminal only under its own legislation.¹ Governor Bell of Ohio (1848) refused Kentucky the extradition of fifteen persons charged with aiding the escape of fugitives on the ground that the laws of Ohio did not recognize property in men.² Slavery was never a national, but only a municipal right. The states of the north had constitutionally abolished slavery.

The Civil War was in part an "industrial revolution." Capitalization of labor was no longer economically justifiable, and the mechanical north was strong enough to enforce its will upon the agricultural south. The legal steps crystallizing the rapid effects of force were: the forfeiture of the claims of the master of a servant employed against the government (August 6, 1861), proclamations of emancipation by General Fremont in Missouri (August 6, 1861) and by General Hunter in South Carolina (May 9, 1862), which were disallowed by the government; the prohibition of the army from returning slaves (March 13, 1862); a congressional resolution in favor of compensation to states emancipating slaves gradually (April 10, 1862); abolition in the District of Columbia (April 16, 1862), in the territories (June 19, 1862); the freeing of the captured, deserted or fugitive slaves of rebels (July 17, 1862); the emancipation proclamation (January 1, 1863); the abolishment of the fugitive slave law (June 28, 1864). The XIIIth, XIVth, XVth amendments completed the transformation of property into property owners so far as that might be done by legislation. There was confiscation in the change. In the XIVth amendment it was declared: "But neither the United States nor any state shall assume or pay

¹ McDougall, *Fugitive Slaves*, p. 70.

² *Ibid.*, p. 41.

any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void." Georgia and Maryland did not waive the claim for compensation. In Arkansas in March, 1861 a slave was sold warranted for life. After the adoption of the amendment, action was brought for a promissory note given in payment. The contract was sustained, but it was held "that the warranty of the slave for life was not a warranty of continuity of title against the acts of sovereign power."¹

"The half of manhood which Homer says slavery takes from a man cannot be restored by merely putting on him the cap of liberty."² The negro had been prepared for freedom in the school of oppression and sometimes exercises license as his master taught it to him. Responsibility will be realized with ownership. Many negroes are, through being propertyless, kept in slavery by the crop lien and peonage systems, by which men are held to labor for creditors, and by fraud are kept in debt perpetually. But there is a rapid increase in the ownership by negroes. Thus Kentucky colored men own 171,570 acres of land. Philadelphia negroes own \$5,000,000 of property.³ In 1874 negroes owned one in every eighty-five acres of improved land in Georgia; in 1880 one in fifty; in 1890 one in thirty-one; in 1903 one in twenty-five.⁴ The political dominance of the aristocratic class has been greatly diminished, in consequence of the end of complete ownership in America.

¹ *Osborne vs. Livingstone*, 13 Wallace, 654.

² Goldwin Smith, *United States*, p. 266.

³ DuBois, *The Philadelphia Negro*, p. 179.

⁴ Banks, *Land Tenure in Georgia*, pp. 69-70.

CHAPTER IX

LIMITATION OF LAND OWNERSHIP

ANY assertion of a definite period of limitation of the powers of land ownership must be made with hesitation. Limitation is, rather, inherent and constant. Private property can scarcely exist in land. Austin says: "By absolute property in a movable thing we mean what the Roman lawyers called *dominium* or *proprietas*. But in strict law language the term is not applied to a right or interest in immovables." The Vermont constitution declares that "property ought to be subservient to public uses."¹ "It is competent for every state to impress upon all property within its territory any character which it may choose."² Some of the social subtractions from individual interests in land may here be put together, leaving it for legal students to determine the present relative position of liberties and limitations on land ownership. These "public partial rights" are enforceable under the police power of the state under whatever may be the state's current "public policy." *Salus populi suprema lex*.

Social subtractions from private ownership are: (a) from the right of possession (and use): (1) for public (or private benefit): eminent domain; escheat; fines and forfeitures; taxation; (2) for private benefit (publicly enforced): adverse possession; future and conditional estates; liens;

¹ *Cons.* 1777, I, ii.

² *McCullum vs. Smith*, 19 Tenn., 342.

contracts; tenancy; (b) from the right of use: easements; right of way; pledges; nuisances; police regulation; public policy; (c) from the right of disposition: inheritance; rule vs. perpetuities; inheritance tax; restrictions on transfer. Some of these, to be sure, are named only to make the list of opposing claims complete, without regard to the present greater or less extent of their operation.

All titles to land are in theory from the state; and the state resumes its own by escheat, by forfeitures, by eminent domain, by tax, by voluntary transfer. The Tahiti chief asks his subject: "Whose pig is that?" The subject replies: "It belongs to thee and to me." Civilization reverses the pronouns. The Caledonian chief dines off his subject and salts the rest of him down. This is a case of eminent domain where land has no value. The civilized state pays for what it takes, although in some states the onus of instituting proceedings to ascertain and enforce compensation is put upon the owner.¹ "The owner of private property holds it also subject to a paramount right of the government to appropriate it without his consent."² Thus Massachusetts allows the commonwealth or a city to take the whole of any estate part of which is actually required for a public work, if the remnant left after taking such part would from its size and shape be unsuited for the erection of suitable and appropriate buildings.³ Private advantage, as the profit of a railroad corporation, may accrue from the exercise of right of eminent domain granted it by the state. Thus in Wisconsin a railway company may condemn land for the construction of branches and spur tracks from any existing road to and upon the ground

¹ Tiffany, *Real Property*, ii, p. 1071.

² McClain, *Constitutional Law*, p. 100.

³ *N. Y. Lib. Bul. of Leg.*, 25 e3.

of any mill, store house, manufacturing establishment and the like.¹ The right has even been granted for the erection of a mill.² The right may be granted to private individuals to accomplish any purpose for the public good.³

"It is not requisite that the use and benefit to be derived shall be universal nor in the just sense even general."⁴

"It has been held that a road primarily for the accommodation of a single family does not effect its character as a public highway.⁵ Compensation is not invariably secured for "consequential damages." Thus the owner of land abutting on a highway is not entitled to compensation for the loss of value caused by a change of grade.⁶

The failure of heirs causes the land to revert to the state as its ultimate owner. Since a state is the sovereign owner, a change in the political sovereignty of any region produces a change in the individual property in that region. Thus the early jurisdiction over Vermont was disputed between New York and New Hampshire. During the controversy settlements were made on tracts granted by each government. Upon the establishment of the claim of New York, those who did not take out new patents were dispossessed by rival claimants.⁷ The Revolutionary war was accompanied by the confiscation of the property of royalists.⁸ The confiscations of proprietary lands succeeding the war have been referred to. "The revolution in

¹ *Statutes* 1898, par. 1831a.

² 15 Wallace, 500.

³ *Am. and Eng. Enc. of Law*, x, p. 1059.

⁴ *Haswell vs. Armstrong*, 19 N. Y., 1063, cited in *Am. and English Enc. of Law*, x, p. 1063.

⁵ *Am. and Eng. Enc. of Law*, x, 1074.

⁶ Tiffany, *Real Property*, i, p. 816.

⁷ Hough's *Constitutions*, footnote under Vermont.

⁸ Tiffany, *op. cit.*, ii, p. 1051.

property as well as the revolution in government which was produced by the separation of the United States from the mother country introduced a state of things for which in many respects no other country can furnish a precedent. Many persons never took possession of lands to which they were entitled, or abandoned their possessions and have never preferred claims since. Others lost evidence of theirs and therefore were deprived of the means of prosecuting their rights where they were so disposed."¹ Property in the south was violently disturbed in consequence of the revolution of government by which the carpet baggers came in power and plundered the owners by means of confiscations for taxes. Thus in Mississippi 640,000 acres were forfeited for taxes.² South Carolina's tax in 1871 was \$2,000,000 on a value of \$184,000,000. In 1860 it had been \$400,000 on a value of \$490,000,000. The debt of Louisiana grew from \$6,000,000 in 1868 to \$50,000,000 in 1872.² This confiscation was analogous to the confiscation of slaves. Reference will perhaps not be allowed to the dispossession of Indians.

Property is subject to fines, forfeitures, or pecuniary amercements for crime, by which the outer personality of the rich receives the punishment given to the actual or inner personality of the propertyless. Thus land acquired by corporations in violation of the law may be forfeited in some states.³ Where one fraudulently or wrongly mixes his goods with those of another so that the goods cannot be distinguished, the wrongdoer forfeits all of his property in the mixture to the other party.⁴

¹ *Wilkins vs. Tart*, 3 C. C., 518.

² Wilson, W., *United States*, v, p. 47.

³ Tiffany, *op. cit.*, ii, p. 1051.

⁴ *Am. and Eng. Enc. of Law*, vi, p. 595.

The power to tax has been called the power to destroy.¹ "It (taxation) may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state or corporation may prescribe."² If not otherwise enforceable taxation may be enforced by tax sales by which not only the tax, but sometimes part of the value of the property is taken from the owner. Such use of the property as destroys the value of the public interest in it may be restrained. It was held in New York that an owner of timber upon which the tax was unpaid might be restrained from cutting bark and so damaging the state's property. It is competent for the legislature to restrain acts which would strip the land of its chief value and tend to make unavailing the final remedy."³ In nearly all of the states there are statutes giving preference to taxes, rates and other debts due to the state over the debts of the citizens. The national government has an undoubted right under the constitution to enact laws by which debts due to it shall be preferred to those of other creditors.⁴ In feudalism the benefits, subsidies and reliefs given to the lord established his claim to them. So in New England the "peck of wheat from every one whose heart was willing" for the support of poor scholars in Harvard College soon became a less voluntary offering.⁵ The development of private liberty to some extent before the completion of political unity caused Americans to offer more resistance to taxation than did the English. Before 1789 Congress could not enforce taxation. The first direct tax of Pennsylvania was levied in 1785. There are few instances of

¹ *McCulloch vs. Md.*, 4 Wheaton, 316.

² *Weston vs. City of Charleston*, *Lalor's Encyclopedia*, "Taxation."

³ 111 N. Y., 460.

⁴ *Am. and Eng. Enc. of Law*, xxix, p. 162.

⁵ Ely, *Evolution of Industrial Society*, p. 37.

state taxes in Maryland before 1841.¹ Valuations and usually assessments were arbitrary, upon selected objects rather than upon all property. Thus Connecticut assessed according to the mode of culture. Subsequently while private property was developing absoluteness taxation also became a system. This system makes a more or less futile effort to respect private property by uniform taxation of all property on its selling value. The increasing difficulty and dissatisfaction attendant upon our tax system in the second half of the national history, when property cannot be found as easily as it once could, indicates the changing and less definite character of property. Taxation, even when it is increasing in amount, may be a less limitation on the prevalence and security of the idea of private property than is the inequitable administration of taxation. Bad distribution tends to instability of property. The theory of adjusting the tax to the ability of the taxed is everywhere met by the fact that cupidity increases with acquisition. Indirect taxation taxes the poor in behalf of the rich. Tangible property pays more than personality. From Maine to California there is but one opinion of the present system. That is that it is inequitable. A West Virginia judge says: "The richer the man the less the tax in proportion to his property."²

Possible socialization of taxation appears in the advocacy of progressive taxation, which recognizes that ability to pay increase faster than fortune, because the later additions to capital are easier than the first acquisitions; and that the accumulation is that by capital rather than by man. Hence justice requires more than proportional taxation. Other indications of socialization through taxation are in the

¹ Ely, *Evolution of Industrial Society*, p. 45.

² Quoted in Ely, *Taxation*, p. 152.

increasing of inheritance taxation; in tax inquisition by private detectives; in the character of the tax exemptions and in the social purposes to which taxation is increasingly applied. The exemption of social property from taxation is an imposition on private individual property. Exemptions are given increasingly in various jurisdictions to burying grounds, public school grounds, school buildings and apparatus, libraries, churches, property used for religious purposes, public hospitals, academies, colleges, universities and seminaries, public libraries, books, paintings and statuary in free public halls, institutions of purely public charity, public property, property held for scientific, literary or fraternal purposes, and a limited amount of individual personal property. Governmental expenditures for purposes that may be distinguished from purely protective and administrative purposes are proportionately increasing. Such expenditure gives some economic security to the propertyless at the expense of property. The expenditure of the United States, exclusive of post office expenses and payments of the principal of the public debt, has increased from \$2.04 per capita in 1800 to \$6.39 in 1900 and \$5.96 in 1902.¹ States have levied taxes for all social purposes from maintaining universities to buying wooden legs for confederate soldiers. Expenditures per capita of the school age (5-8) increased from \$5.62 in 1871 to \$11.86 in 1904.² The maintenance of agricultural, commercial and normal schools from taxation must influence distribution. In the latter part of the nineteenth century agricultural colleges were established in every state and territory. From five to three hundred farmers' institutes are held annually in each state, usually at public expense.

¹ Bullock, *Readings in Public Finance*, p. 40.

² *Summary of the Statistical Abstract*, 1905.

Aside from the tariff, whose benefits are not diffused in ownership, expenditure in aid and supervision of various industries tends to socialization. The annual expenditure for the federal department of agriculture is \$2,000,000. In 1903 fourteen states passed drainage laws by which majorities in communities may enforce co-operation on the part of all, while the arid states have irrigation laws of the same power. Public charities have been enormously increased in the latter half of the century. Thus pensions have been increased from \$63,404,000 in 1886 to \$142,550,266 in 1904. In Massachusetts the largest public expense was that for charities \$2,406,934.92.¹

In addition to the foregoing social subtractions for public benefit, sometimes for private benefit, there are various partial rights in ownership usually created by private contract or in default of private right or agreement, but publicly enforced. Moreover the state may acquire and hold these rights in its own behalf. These are prescription, adverse possession, future estates, conditional estates, trusts, mortgages, pledges, liens, contracts and tenancy. All these voluntary relinquishments of the rights of ownership become legal limitations of the privileges of the owner. All disposable partial rights are called property. Thus a tenant for life, a tenant for years, a tenant in common is called an owner.² Land is increasingly subject to these incorporeal rights.

Open and continuous adverse possession for a statutory period, usually twenty years, bars the owner's right. Thus if a tenant disclaims to hold of a landlord and the landlord does not recover the statute of limitations begins to run.³

¹ Bullock, *Readings in Public Finance*, p. 664.

² *Am. and Eng. Cyc. of Law*, "Titles, Ownership and Possession."

³ Tiffany, *op. cit.*, ii, p. 1010.

An ownership may be the possession of only a reversion, or residue of estate remaining in the grantor after some lesser estate has passed. It may be a vested remainder, an estate dependent upon some future event, and created by the act of the parties, commencing after the determination of a previously limited estate in the same subject of property. It may be a contingent remainder, or one dependent upon an uncertain future condition. The partial interest may be an executory devise, one that does not depend upon the determination of a particular or previously defined estate, but upon some future contingency, or at some definite time in the future. Conditional estates—those that revert upon the failure of a certain class of heirs—may be created without regard to common law rules.¹ Such partial estates must evidently diminish the definiteness of private property.

The laws of mortgages have tended to greater security of ownership. But the mortgage remains an instrument of limited ownership. Mortgages are *jura in re alieno*. Title but not possession passes. In pledges on the other hand, possession but not title passes. A lien is a right to retain possession of the property of another as security for some debt or charge. Land was formerly not subject to liens for simple contract debts, but only for debts under sealed contract binding the heirs. Now in all states it is equally liable with personalty. It is subject to certain statutory liens, judgment liens, or charges upon all the property of the debtor for periods varying from one to twenty years; to mechanics' liens on constructions by them; to attachment liens levied on property auxiliary to recovering money. Property is subject to the writ of attachment by the sheriff during an action, in satisfaction of demands by a plaintiff,

¹ Tiffany, *op. cit.*, i, p. 344.

who usually must be a creditor; in some states, for the payment of a debt not yet due, under peculiar circumstances, as upon an absconding debtor.¹ Property is subject to attachment by garnishment, or taking the property of a defendant, which is found in the hands of a third person.

To understand clearly how all these "incorporeal hereditaments" constitute partial ownership of the man subject to them, it is necessary only for him to leave his debts or his taxes unpaid. He will find that the "due process of law" gives little more protection to him than it does facility to his creditor. In recent constitutions there is a general tendency in the interest of the debtor class.² This parallels the ancient effort of Solon to mitigate private property. Of contracts in general it may be said that whether they arise voluntarily or by compulsion, contracts with consideration, or amercements are, until performed, charges, limitations, partial rights in ownership of one or both the parties contracting, and may frequently greatly obscure individual ownership.

The destruction of feudal tenures was part of the development of private property in land, but tenancy, legally protected, cannot disappear as a limitation on private property. It is a necessity both to the enjoyment of extensive property and to the tenant's life and civil status, for men must live on and from the soil. Thus a new form of estate was made necessary by the economic rearrangement of the south, upon the loss of slaves. In Georgia by the laws of 1866-74 liens were allowed to landlords on the crops of tenants for stock, farming utensils and provisions. These aid in the establishment of a species of serfdom.

The tenant has his rights of possession, use and disposi-

¹ Bouvier, *Law Dictionary*, i, p. 188.

² Baldwin, *Modern Political Institutions*, p. 73.

tion. Courts of equity disfavor joint tenancy. On eviction a tenant has a right of action on a covenant for quiet enjoyment. Even a tenancy at will cannot be terminated without notice sufficient to protect the tenant's right to crops.¹ In some states an owner is liable for damages for forcible entry without legal process, the tenant holding over without consent.² In most of the states compensation for improvements made by tenants is estimated by courts or by express legislation.³ The tenant has property rights to use. The tenant may cut timber for reasonable uses or by local custom,⁴ and the general tendency of American courts is to restrict the English law of waste and to stimulate development by the tenant in possession.⁵ The lessee may assign his lease to heirs, or in the absence of conditions, he may sublet. Even the tenant by the year may assign or bequeath his tenancy. Increase in tenancy, by compounding claims, portends a change. Less than one-third of American families own unmortgaged homes. From 1850 to 1880 the tendency was to diminution in the size of farms. Since that time the tendency is in the opposite direction. The distribution according to tenure is as follows:

	<i>Owners.</i>	<i>Cash tenants.</i>	<i>Share tenants.</i>
1880.....	74.5%	8%	17.5%
1890.....	71.6	10	18.4
1900.....	64.7	13.1	22.2 ⁶

The increase of the proportion of tenants is probably from the ranks of the laborers.

Various subtractions made primarily from the enjoy-

¹ Tiffany, *op. cit.*, i, p. 142.

² *Ibid.*, i, p. 156.

³ *Ibid.*, i, p. 553.

⁴ *Ibid.*, i, p. 561.

⁵ *Ibid.*, i, p. 566.

⁶ *XIIth Census*, v, p. 689.

ments of ownership may be roughly classified under: easements; the restraint of nuisances, and building and sanitary laws or police regulations.

All states have a right of way over all territory within them. The right to pass over another man's land may be acquired also by an individual. Easements are rights which "one proprietor has to some profit, benefit or beneficial use out of, in or over the estate of another proprietor."¹ Thus it may be a right to prevent a man from building a wall on his own land beyond a certain point, the right of way for a mill race, for artificial channels, to take water from a premise. Such rights as these render one property servient to another or dominant tenement. They are called variously: easements appurtenant, or those attached to some superior right; easements in gross, rights attached to persons rather than to property in land; affirmative easements, or those giving right to some active use of the land of another; and negative easements, or restrictions on the use of the servient tenement. These rights can not lawfully be altered by either proprietor. They are acquired by grant, by prescription, by legal condemnation. Other similar rights are licenses to do certain things on the lands of another; customs, which are not definitely attached to land; the "natural rights" of lateral support of land in its natural condition, of the lower riparian owner to receive the undiminished flow of a natural water course; of the upper tenement to discharge surface water upon the lower tenement; and profits *a prendre*, which, contrary to easements, are rights to profit in the land or produce of another. Covenants running with the land, as to repair dams, pass to a transferee in this country.

The state enforces a various and increasing number of

¹ *Am. and Eng. Cyc. of Law*, "Easements."

limitations on uses for the benefit sometimes of a large, sometimes of a small number of people to whom the prohibited use is obnoxious. As every citizen is theoretically bound to conduct himself in a way that does not infringe upon the rights of others to conduct themselves according to their legitimate desires, so every citizen holds his property subject to the implied obligation to use it in such a way as not to prevent others from the enjoyment of their property. The infringement of either the personal or the property enjoyment of another is called a nuisance. What may constitute a nuisance depends upon its location and the prevailing sentiment with regard to the desirability of the thing in question. What is allowed in one place may be condemned in another. Thus coal burning was once a nuisance in England and Edward III issued a proclamation against it. It may be a disorderly house, or a fertilizer or soap factory or the like. Glass factories, blacksmith shops, potteries indeed have been condemned as nuisances. It may be the use of powder magazines, animal traps, barbed wire fences; maliciously erected fences; dust from carpet cleaning; unnecessary and even sometimes necessary, noises; keeping a hot cookstove near a partition; offensive odors. Innumerable similar uses of property have been condemned by abatement, by injunction, by suit for damages. If surrounding sensibility or property is injured, neither intention, nor careful conduct, nor legality of the business, nor the existence of similar nuisances nor priority of location is a defense, nor a security against abatement, fine, damages or imprisonment.

Under police regulation and building laws the owner may be restrained from uses of his property that are not in accord with the local usage, and he may be subject to taxes other than pecuniary taxes, such as the duty of keeping side

walks clean and in repair. He may be required to bear the cost of official supervision.

Certain restrictions on the use of property, like agreements by purchasers of uniform lots restricting their future use, are enforceable in equity.

Restrictions on disposition are inheritance laws and taxes, and restrictions on transfer. "The most universal and effectual way of abandoning property is the death of the occupant."¹ Prescriptions of inheritance, looking to redistribution of property, are increasingly imperative and prevalent. "The laws of descent and devise being the creation of the statute law the power which creates may regulate and may impose conditions or burdens on the right of succession to the ownership of property to which there has ceased to be an owner."² The greater freedom of bequests is at the same time an increasing limitation on existing private property. The right to receive lands and tenements by bequest is limited in but few states, and our legislation shows a constant tendency to preserve for public and charitable uses, funds which have once been appropriated to such uses against the attacks of disappointed heirs.³ Moreover the will has less extension into the future than formerly. It is impossible to say whether this is more a limitation or a liberty of property. It limits the power of the dying while increasing the power of the living. And the rights of inheritance are preserved by the interpretations of wills whenever possible. American legislation especially protects the rights of children. Most states protect children not provided for in the will. Some states revoke such

¹ Blackstone, ii, ch. i.

² Knowlton vs. Moore, 177 U. S., 41, cited, Ely, *Industrial Society*, p. 278.

³ Daggett, in *Two Centuries of Am. Law*, p. 200.

a will.¹ The issue of children deceased before the testator is protected.¹ Thelusson's Act of 1800, which has been followed in some states, restricts the period in which an estate may accumulate to the life of the giver or to twenty-one years after the death of the giver or during the minorities of any living at his death or to the minorities of those entitled to the income of the fund. Plato states the principle of inheritance laws: "O my friends, we will say to them (the dying) hard is it for you, who are creatures of a day, to know what is yours, hard too, as the Delphian oracles say, to know yourselves at this hour. Now I, as legislator, regard you and your possessions not as belonging to yourselves but as belonging to the state. I will legislate with a view to the whole, considering what is best both for the state and for the family, esteeming, as I ought, the feelings of an individual at a lower rate."²

Inheritance taxes are the successors of the ancient primer seisin, or taxes on the death of a tenant. From the small tax of Pennsylvania in 1826 the inheritance tax has grown to a system embracing thirty states, the general advance being since 1890. Fourteen of these apply the tax to direct as well as to collateral inheritances. Progressive taxes are levied in seven states. Twenty inheritance tax statutes were passed in 1903 by sixteen states.³ Thus Oregon taxes direct inheritances of estates above \$10,000, 1% to be levied only on the excess above \$5,000 received by each person. On collateral inheritance the rate is 2% on the excess above \$2,000 received by each person. In other cases the rates are 3% on amounts between \$500 and \$10,000; 4% on amounts between \$10,000 and \$20,000;

¹ Daggett, in *Two Centuries of Am. Law*, pp. 188-9.

² *Laws*, xi, 923.

³ *N. Y. Lib. Bul. of Leg.*, 22, h27.

5% on amounts between \$20,000 and \$50,000 and 6% on all amounts above \$50,000. Iowa (1904)¹ introduced a discriminating rate of 20% against non-resident aliens, except that if they are brothers or sisters of the decedent they are taxed 10%. There is a marked tendency to exempt benevolent and charitable institutions. Thus New York has increased the amount of land that may be held by benevolent and charitable institutions from an income of \$12,000 in 1875 to an income of \$500,000 in 1892.² The amount taken by government in this way was in 1900-1, \$5,211,898.68.³ The state took from the estate of Cornelia M. Stewart \$300,410.32; of Henrietta A. Lenox, \$234,126.90; of Samuel J. Tilden, \$147,283; of Daniel Fayerweather, \$111,788.50; of William E. Vanderbilt, \$81,011.55.³

An owner may not transfer his land in fraud of creditor, or of subsequent purchasers. The owner is thus made a quasi trustee. Debtors cannot transfer land to a creditor within a certain time before being declared bankrupt.⁴ In some states land in adverse possession cannot be transferred. Criminals imprisoned for life lose the power of transfer *inter vivos* with other civil rights.⁵

In consideration of the increasing intervention of governments in the management of natural monopolies, it may be better to speak of certain rights as private partial rights in public property than as public partial rights in private property. Thus game and fish are protected by closed seasons and by the prohibition of certain forms of hunting and fishing, the ownership of game not being regarded as

¹ *N. Y. Lib. Bul. of Leg.*, 25, h7.

² Freund, *The Police Power*, p. 376.

³ West, *The Inheritance Tax*, p. 86.

⁴ Tiffany, *op. cit.*, ii, p. 1107.

⁵ *Ibid.*, ii, p. 1161.

private property. The ownership of dogs is only a qualified property, entitling the owner to no compensation for loss from the state.¹ Natural gas in the soil may not be wasted by the owner of the soil.² A riparian owner is not entitled to compensation where his right of access is cut off by a public improvement undertaken for the benefit of navigation.³ The ownership of the natural water supply has been allowed in the arid states, but subject to state control.⁴

Once land was a social property. Then the ancient empires made it private property. Later feudal sovereignty attached to land; then sovereignty was conceived to be detached from land, which was then called private property. Finally land is being attached slowly to sovereignty, this time possibly to the sovereignty of the people, if the present democracy is real, through the exaction of the private partial rights that have been named. The landlord is at least beginning to be conceived as the tenant of society. The police power swings a larger club over the indefinite residuum of private property.

¹ Freund, p. 447.

² *Ibid.*, p. 449.

³ *Ibid.*, p. 428.

⁴ *Ibid.*, p. 440.

CHAPTER X.

LIMITATION OF CORPORATE OWNERSHIP

THE concentration of private ownership of industrial opportunity entails the limitation of corporate privilege. The declaration of independence of Thomas Jefferson and of Adam Smith was individual, not corporate. The monopoly and abuse of corporate power obscures the right to private property in it. The possession, through the private appropriation of corporate strength, of an annual individual income of \$30,000,000, such as one man is said to have,—that is, at least as much as the income of thirty thousand ordinary men,—can no longer find any justification on the theory of individualism or private property, which never rationally contemplated any such obstruction to the liberties of other men. No man is by virtue of his individuality entitled to so much more than the feeblest of sane men. If, as supposed, there is a system of collusion between the carriers and the large shippers for a monopoly of the trade and the elimination of small shippers, private property has passed beyond its greatest height and is no longer in fact private. When there is no competition there is no longer what has in this essay been described as a period of private property in commerce. Although private property by its very nature ultimately limits its own distribution, the period when a relatively large number of men can acquire it has been called the period of private property. These combinations even when their stocks are diffused diminish the liberty of private property by the indirectness of the ownership. The minority stockholder is

subject to a majority and that not of men, but of stock. "Shares" are taking the place of property in industry. The delegated management or the acquired management is inevitably subject to legal restriction. When one man can be a director in one bank, one trust company, one insurance company, two safe-deposit companies, twenty-three railroads, eight telegraphs, two telephones, one cable line, and one steamship company, as George Gould is said to be, in each nominally subject to the rights of his colleagues, what has become of the conception of private property as a possession subject to the will of its owner? ¹

The Union Railway Company of Rhode Island operates the street railways. Its stock was purchased by the United Traction and Electric Company of New Jersey. This company leased it to the Rhode Island Company, whose stock is owned by the Rhode Island Securities Company of New Jersey, whose stock belongs to the United Gas and Improvement Company of Pennsylvania.² Some men in the center of the maze control the profits of these financial operations in the stock market but what has become of private property, as it is theoretically understood? The function of ownership of trade becomes less the connection of production and consumption than the trade in profit on that function, which is carried on by subordinates. The increasingly fraudulent, temporary and speculative character of stock ownership under these conditions is destructive of the stability and reality of private property. Officers speculate in the shares of their own companies. A hierarchy of holding companies enables manipulators to cheat investors. The capitalization of assets is often limited only by the ability

¹ *Pub. of Am. Ec. Assoc.*, 3d Series, v, 2, May, 1904.

² Ripley, *Trusts, Pools and Corporations*, p. xix.

of the promoters to make sales of fraudulent stock, or inflation of "good will." Thus it is said that the United States Steel Corporation paid for the \$320,000,000 stock and bonds of the Carnegie Company \$163,400,000 of preferred stock, \$155,200,000 of common stock and \$304,000,000 of bonds.¹ From whom did the property gain of nearly one hundred per cent come to the Carnegie Company? Credit is appropriated by the control of corporations over banking institutions and is sometimes applied to the payment of dividends out of profits that do not exist.

The disposition of capitalists to consider not less than fifteen or twenty per cent fair profits is in conflict with the popular disposition to regard the surplus as plunder. There is not a general prejudice, save among the propertyless, against corporate profits as such. Justice White expresses the current opinion, with some disregard of history:² "The governmental power to reasonably control the use of property affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned." Nevertheless President Roosevelt says:³ "They (corporations) are permitted to exist not that they may make money solely, but that they may effectively serve those from whom they derive their power." Courts also have declared that the object of a corporation is the public accommodation and the promotion of public interests, that the dividends of the stockholders are incidental. A corporation is not a person and it is not limiting the possibilities of individual action to limit the powers of an association which is not an individual and which subverts the

¹ Montague, *Trusts*, p. 105.

² *Northern Securities Decision*, Ripley, *op. cit.*, p. 379.

³ *Message of December, 1904.*

theory of individualism by subjecting independent individuals to the competition of powers greater than are possible to individuals. It has become customary for courts to look through the mask of artificial personality. "Wherever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy." "The care of the public welfare or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bringing about the greatest good of the greatest number."

The police power, that is, the restraint of license in the interest of liberty, is exercised in the exaction of public partial rights against corporations, much the same as in the case of property in land. And since corporations are subject to the duties of citizenship and sometimes transcend the rights of citizens, the police power must exact even more than from individuals. The power of corporations is perhaps strong enough in many cases to secure immunity; nevertheless their voluntary relinquishment of private character by participation in politics and administration for private gain is a potential limitation of corporate privacy.

The New York constitution incorporates a decision: "The laws of this state have made such interests (railroad franchises) taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the rights of property generally."¹ Escheat as well as eminent domain applies to every variety of corporate property. Harmful property may be subjected to restriction without compensation for loss. In extremity the right of property may be totally negated. Thus property

¹ 111 N. Y., 41.

rights are infringed in a small way in the taking of samples of provisions for inspection, in placing boundary monuments, in destruction of property that has become a nuisance; in forfeiture of property unlawfully acquired or used; in destruction for the public safety; in relief of debtors by bankruptcy laws; allowing the discharge of debts in depreciated currency, and in the retroactive impairment of contracts by legislation. These precedents illustrate the power of government over commercial property.

Special exercise of the power of taxation has been made upon corporations. Governor Roosevelt laid down the principle that as a corporation derives its powers from the state it should pay to the state in return for the privileges it enjoys a just per cent of its earnings.¹ This was in the recommendation of a franchise tax, which was laid in New York in 1899. Other states have similar taxes. The character of railroad corporations requires a tax differing from the general property tax, such as taxation based on cash valuation by state officers or on capitalization or on gross receipts. Fifty years ago when corporate property was not fully recognized as property, taxes were seldom put upon incorporation; now such taxes exist in two-thirds of the states.² In 1903 the body of recommendations and legislation on the taxing of corporations for public service is larger than that on any other subject, and the character of it is pretty well defined as that of placing increasing burdens on corporations.³ It must not be forgotten that at almost no time in the assumed period of liberty was ownership free from the limitation of paternalism, in the tariff system which, whatever part tariffs may have had in the general in-

¹ *Message to New York Legislature, March, 1899.*

² *Industrial Com. Report*, ix, p. 1017.

³ *N. Y. Lib. Bul. Leg.*, 22, h24, Fetter.

crease of property, discriminated against part of the people for the benefit of others; and thus contradicted the theory of individualism and contributed to the necessity of further public intervention in industry. It is perhaps significant that the period of passing individualism is also the period of excessive tariffs.

Besides the partial rights in corporate property as property, the state as the creator of corporations exercises unlimited powers over the conditions of their operations. Before the prevalence of general incorporation laws, it was held that a corporation as a person could do anything that it was not forbidden to do. Now, however, ultra-vires acts are void. While this originally secured corporate liberty it now, so far as it is observed, limits the exercise of liberty.

The theory of the right of patent monopolies has been modified by the public right to profit by industrial progress. The Supreme Court has decided that the production of improvements reasonably certain to have been adopted in the development of industry does not entitle the owner to a patent.

The mischievous effect of some charters, such as those binding a state to exemption from taxes, or the abuse of charter powers, led to judicial reversal of the Dartmouth College decision which had made a charter a contract, and hence inviolable. The grounds of this reversal are: (a) that the state cannot barter away any of its political power, as the right to tax;¹ (b) nor can it barter away its police power to preserve the general welfare, as in the abolishment of a lottery,² or the revocation of a grant to a fertilizing factory around which grew up a city.³ The

¹ Tiedemann, *Unwritten Constitution*, p. 56.

² *Stone vs. Miss.*, 101 U. S., 820-1.

³ *Northwestern Fertilizing Co. vs. Hyde Park*, 97 U. S., 659.

United States Supreme Court intimates that it is implied in every charter that the corporation shall be subject to reasonable regulation.¹ (c) The contract character of charters is evaded on the ground that all grants must be construed favorably to the state, and courts "are alert and astute to find exceptions to the doctrine of the Dartmouth College Decision." Thus a second bridge company was sustained against a first on the ground that a franchise is not an exclusive privilege unless expressly declared so.² Other charters have been evaded on the theory that there was an implied reservation of powers in the legislature.³ A water company contracted with Mobile to supply the city with water for a term of years, receiving the sole privilege of supplying it from a certain creek. This contract was held not to be impaired by a contract with another company to supply water from another source.⁴ "There is no public contract however explicit, though made for a fair compensation, which has been fully paid, from which the public cannot recede, should this be found necessary for the public good."⁵ Detriment to the state is also avoided by the custom of granting franchises subject to repeal and amendment, a reservation which now appears in general incorporation laws and state constitutions. Several state constitutions provide that the police power of the state shall never be abridged so as to permit corporations to conduct their business so as to infringe the rights of individuals or the general well-being of the state.

Advantage in industry or trade which tends to become

¹ *L. & N. Ry. Co. vs. Ky.*, 161 U. S., 677.

² *Charles River Bridge Co. vs. West River Bridge Co.*, 11 Peters, 536.

³ *Brannon, op. cit.*, p. 361.

⁴ *Ibid.*, p. 361.

⁵ *Beer Co. vs. Mass.*, 97 U. S., 28, 33.

monopoly in the strict sense of sole control, increases the exercise of the police power. This opposition is expressed in decisions under the common law against monopoly; in constitutions and in statutes.

General or unreasonable contracts in restraint of trade are void at common law. (a) Contracts with restrictive associations binding not to buy or not to sell are void. Thus in the case of *Raymond vs. Leavitt* the plaintiff was told that he must use other than legal means to recover money loaned to a combination for the purpose of controlling the Detroit wheat market.¹ (b) Agreements between competitors to avoid competition by limiting business or fixing prices are void. New York (1847-8) held such agreements among canals illegal.² Such agreements to control coal supplies were held illegal in Pennsylvania and Ohio.³ Combinations of corporations to place their shares in trust with a managing board, were held illegal because *ultra-vires*, corporations having no right to form partnerships. Accordingly the Sugar trust and the Standard Oil trust were declared illegal.⁴ The stockholding corporation which followed the trust is also illegal.⁵ "There is no magic in a corporate organization which can purge the trust scheme of its illegality."

Many state constitutions declare against monopolies. Thus the Maryland constitutions from 1776 to the present declare that monopolies are "odious and contrary to the genius of a free government." Massachusetts said in 1780: "No man or corporation or association of men have any other title to obtain advantage or particular and exclusive privileges distinct from those of the community

¹ Freund, *op. cit.*, p. 337.

² *Ibid.*, p. 342.

³ *Ibid.*, p. 343.

⁴ *Ibid.*, p. 345.

⁵ *Distilling and Cattle Feeding Co. vs. People*, 156 Ill., 448.

than what rises from the consideration of services rendered to the public."¹ Democracy instinctively opposed these subversions of popular privilege. These declarations were followed by the prohibition of hereditary emoluments, honors and privileges. In that time men wanted freedom *from* control, not freedom *to* control as they did later when they forgot English tyranny.

Since 1870 the new state constitutions forbid combination of competing railroad and telegraph lines. Before 1870 only one constitution, that of Michigan, contained an anti-trust clause such as is now common. After the Inter State Commerce Act prohibiting pooling by railroads, about seventy laws were passed from 1889 to 1899 in twenty-seven states for the suppression and punishment of monopoly.² These statutes were directed against the creation or carrying out of monopolies in trade, the reduction of production or of price, the prevention of competition, the fixing of standard prices, the making of contracts not to sell below a certain price. Twenty-one states made it criminal for two or more to enter into any agreement—regardless of whether it were reasonable or unreasonable—whereby free competition in production and sale was prevented. Seventeen states made it criminal conspiracy for two or more persons to agree to regulate the quantity or price of any article to be manufactured, mined, produced or sold, regardless of whether prices were raised or lowered.³ The courts generally uphold such legislation.⁴ Most of these acts were nullified, in spite of a few enforcements, by the rule

¹ Horack, *Industrial Corporations*, p. 18.

² Freund, *op. cit.*, p. 331.

³ Montague, *Trusts*, pp. 131-2.

⁴ Jenks, in *Industrial Commission Report*, ii, p. 87.

of comity whereby the corporations of the liberal states could do business in spite of the law. The federal anti-trust law of 1890 sought to check this, making attempts to monopolize interstate trade punishable by fines and imprisonment, with three-fold damages to the aggrieved party. The federal attorney can institute proceedings against the corporation and restrain it by injunction. Most of the suits under this law have failed. The Supreme Court in the first case refused to restrain the Sugar Trust as being engaged in production and not in interstate trade.¹ But the law was applied to an association of railroads to "maintain reasonable and just rates," "to prevent unjust discrimination" and to establish joint traffic agencies, "to secure to each road an equitable proportion of the competitive traffic."² Six companies engaged in the manufacture of cast iron pipe, made an agreement that there should be no competition between them in any of the states and territories mentioned in the agreement, thirty-six in all. This was enjoined as a contract in restraint of trade.³ An attempt to combine the Great Northern and Northern Pacific railroads under a New Jersey "holding corporation" dating from 1901, in order to avoid competition was finally frustrated by the Supreme Court (March 14, 1903), although similar railroad combinations have been left unchanged.

Standard Oil has had much legal attention. Thus suit was brought in Kansas (1905) to appoint a receiver to oust the corporation from the state. The legislature passed bills aimed at the trust: one to build a branch penitentiary

¹ U. S. *vs.* E. C. Knight Co., 156 U. S., 1 (1894).

² U. S. *vs.* Trans-Missouri Freight Association, 166 U. S., 290 (1897), and U. S. *vs.* Joint Traffic Association, 171 U. S., 505 (1899).

³ Addyston Pipe and Steel Co. *vs.* U. S., 175 U. S., 211 (1899).

for the refining of oil (declared unconstitutional); another declaring pipe lines common carriers and a third prohibiting discrimination in rates by railway and pipe lines. Illinois investigated the pipe lines. The attorney general of Missouri obtained a temporary injunction restraining the company from doing business in Missouri.

A bill in equity accused the "beef trust" of an alleged illegal combination, perpetrating fraud on the people by exercising their power to raise unduly the price of dressed beef; declaring that they were oppressing and grievously injuring the farmer by forcing him to sell his livestock at prices unprofitable to him and by issuing instructions to their agents not to compete in bidding after prices have been unduly bid up at various points and the owners of livestock have been induced to make large shipments to those points, and declaring that independent packers were being forced to the wall by the lowering of prices where competition was keen, the losses there being recouped by raising prices where the field had been conquered. This accusation was sustained and the trust was enjoined. Upon disobedience an investigation was ordered and indictments were brought against twenty-six officials. The Bureau of Corporations having made an investigation collecting information from the packers, they escaped on the ground of "immunity," through the compulsion to testify against themselves. In a recent ruling (March 12, 1906) the Supreme Court has decided that no corporation as such is entitled to any of the immunity of natural persons from furnishing evidence against itself by producing or giving access to its books, accounts, etc. Congress also restricted the benefits of immunity to those who are compelled to testify under oath or produce evidence, and the information derived from them may be used in securing the indictment or prosecution of others who have violated the law or of corpora-

tions with which they are connected or whose affairs they have revealed.

"Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed." In the sentiment and legislation on this subject two prevalent ideas seem to be, that the possibility of inordinate accumulation must be preserved, while by some magic no one shall be oppressed by it; the other is a pretty settled conviction that most combinations may be expected to take unfair advantage of weaker competitors, without personal dishonor to the men composing the corporation. This covetousness and this cynicism are the fruits of unrestrained individualism.

Besides the opposition to monopoly as such the police power is much engaged in regulation of the business of corporations. "No legislature can bargain away the public health or public morals. The people themselves cannot do it, much less their servants. The police power of the state which rests largely on legislative discretion cannot be parted with."¹ A state may compel a railroad to operate its franchise.² The state may dissolve it for the misuse or the nonuse of its powers.³ Contracts disabling a corporation from performing its duty to the public are void.⁴ "When one devotes his property to a use in which the public has an interest he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."⁵ This was in sustaining the control of

¹ *Stone vs. Miss.*, 101 U. S., 819.

² *Cook, W. W., Corporations*, p. 790.

³ *Ibid.*, p. 703.

⁴ *Clark, W. L., Corporations*, p. 288.

⁵ *Munn vs. Ill.*, 94 U. S., 113. Freund, *op. cit.*, p. 380.

Illinois over elevator sales. : The "Granger" cases of the same time sustained similar control over railroads. Other businesses have been classed as public at common law, as inn keepers, ferrymen, wharfingers, millers. Others have been classed as public by statutes, as telephones, telegraphs, turnpikes, gas, light, heat, grain storage, stockyards and power through pipes and wires, banking and insurance, and recently the gathering and distribution of news and market quotations.

Banks and insurance were both the first forms of corporations to be encouraged and the first to be thoroughly regulated. The chief early banks indeed were semi-governmental institutions. The abuse of the freedom conceded to banking led to systematic legislation, beginning with the New York law of 1838, by which, among other things, periodical reports and public statements and minimum capital were prescribed. Governmental intervention in banking extended even to the destruction of the state bank note circulation by taxation. At present there is a marked tendency to uniformity in the regulation of financial institutions. Thus the laws of Wisconsin, South Dakota, and North Carolina (1903) require definite reserves and prohibit the holding of real estate other than that required for transacting business. They restrict the amount of money that may be loaned to one individual, and all place these institutions under the supervision of state departments. Similar laws are general. New York imposes additional restrictions on trust companies and savings banks. Franchise abuse and the ruinous practices resulting, the natural outcome of private property in insurance functions led to the first general legislation in New York in 1849 and the first insurance departments, those of Massachusetts (1855) and New York (1859). The same causes have led to the present elaborate regulation, the increased

supervision and publicity and the agitation for federal supervision. Insurance corporations were included under those subject to investigation by the Bureau of Corporations (1903).

The purpose of such laws is the preservation, if possible, of property rights of the depositors and the insured. All restrictive laws indeed aim at this, railroad laws as well as banking laws. "It cannot be disputed that a railroad is a public corporation."¹ Private property in railroads is a public trust. The preambles of the old charters set forth the public services to be performed by the railroads.² Accordingly, from the beginning of railroad history, notwithstanding the predominant power of the roads, the state has sought to participate in their management. Railroad commissioners (Rhode Island, 1836), provisions for publicity of rates, inspection of books by stockholders, power reserved by the state to purchase after a given number of years, limitations of the terms of the charter, state participation in the construction of roads by subscription (as in Maryland, 1827) or by the loan of public credit or by tax exemption (until about 1875), all appear in the earlier railroad history. The early charters likewise regularly contained provisions regarding rates. A number of states give power to railroad commissions to limit or regulate rates.³ Thus an Iowa statute of 1862 required all operating railroads to fix rates per mile for passengers or freight. This was held a police regulation.⁴ In one year there were one hundred and thirty-five separate acts in

¹ *Trans-Missouri Freight Assoc. vs. U. S.*, 166 U. S., 290.

² *Industrial Com. Rep.*, ix, p. 903.

³ Stimson, *Am. Stat. Law*, ii, pp. 435-41.

⁴ *R. R. Co. vs. Fuller*, 17 Wallace, 560.

thirty-one states regulative of steam railways.¹ Texas requires the cause of the delay of trains to be announced. Stopping of trains at intersecting lines is governed. Union depots may be required by the Corporation Commission of North Carolina (1903) when necessary. Indiana requires drinking water tanks in motor cars running continuously over eighteen miles. Iowa (1904) required railway companies to issue to the shipper of one or more carloads of animals a free ticket from the point of shipment to the point of destination.² In Washington it is a misdemeanor to employ inexperienced men on street railways. Some states forbid the employment of drinking or color-blind engineers. A common carrier cannot admit one bus-driver to a depot and exclude others.³ South Carolina requires companies to publish rates on watermelons and canteloupes during January and February of each year, which rates shall not be increased during the year. "The railroads are more controlled than any other institution in the country. They come in contact with the public in more different ways and are more subject to injurious restrictions than any other private interests. Every village board of trustees, every town and city council, every state and every political subdivision of the state in some way regulates the railway business and imposes restraints or taxes or both."⁴ Allowing for the counting-house sense of rights and injuries, these restrictions still indicate the conception of the subordination of railroads to government, whatever may be the facts.

Discrimination, the favoring of valuable patrons, is a pre-

¹ Meyer, B. H., *N. Y. Lib. Bul. Leg.*, 22, 22m.

² *N. Y. Lib. Bul. Leg.*, 25m2.

³ Beach, C. F., *Company Law*, p. 496.

⁴ Hines, W. D., *Am. Ec. Ass.*, 3d Series, iv, p. 84.

valent practice of carrying corporations, incidental to and essential to private ownership. "Ever since competitive railroads have existed, the actual competitive rates, as is well known, have been made by the rebate system."¹ The Senate Committee of 1887 said: "The practice prevails so generally that it has come to be understood among business men that the published tariffs are made for the smaller shippers and those unsophisticated enough to pay the established rates, that those who can control the largest amount of business will be allowed the lowest rates."² But by the common law the obligation to render equal service to all alike at the customary rates is imposed upon common carriers.³ The Interstate Commerce Act makes it unlawful to discriminate between persons or places or to charge or receive more for a shorter than for a longer haul under the same conditions. Congress by the Elkins Law (1903) facilitated prosecutions under the Interstate Commerce Act, by providing for the punishment of the railroads as well as their agents and also for the punishment of the shippers. The Interstate Commerce Commission reports the continued evasion of the law. In 1905 there were 568 complaints before the commission, 65 formal cases and investigations and 45 formal decisions.⁴ These involved 321 carriers. Numerous prosecutions and indictments have been secured recently against rebating. Thus officials of the Chicago and Alton Railroad were convicted for giving rebates to a packing house and officials of the Chicago, Burlington and Quincy Railroad were fined and imprisoned, and four of the packing houses favored were fined \$5,000 each and two officials were fined and imprisoned. The Interstate Commerce

¹ Stickney, *Political Science Quarterly*, March, 1906.

² *Ibid.*

³ Freund, *op. cit.*, p. 398.

⁴ *Annual Report of the Interstate Commerce Commission*, 1905, p. 14.

Commission having been judicially reduced to an investigating and advising board, which could enforce its orders only by suit, a new rate law has been passed (1906), which empowers the commission to prescribe rates. This bill requires interstate carriers, including oil pipe lines, express companies and sleeping car companies to make through rates and reasonable joint rates and publish all rate fares or charges, changing these only on thirty days' notice. The Commission may hear complaints and fix rates.

The forms of incorporation are subject to regulation. The amount of capital to be paid in before beginning business may be prescribed by the state. To prevent "stock watering" by false valuation of property or labor received in exchange for stock, it is frequently provided that "No corporation shall issue stocks or bonds except for money, labor done or property actually received and all fictitious increase of stock or indebtedness shall be void."¹ In order to place responsibility the number of directors is specified in most states. A state may define "foreign corporations," limit their activity and prescribe conditions on which they may do business within its boundaries.² Increased publicity is recently sought. Thus Iowa secures to the public the right to see all information that is required from corporations. Reports are commonly required to state officials. Statutes secure to tax commissioners, auditors, governors, attorney generals and legislative assemblies power to examine the conditions of corporations and require reports. Combinations have been subjected to numerous legislative investigations, such as the Pennsylvania investigation of the coal combine in 1871; the Industrial Commission of 1898-1902 to investigate the conditions of

¹ Horack, *op. cit.*, p. 68.

² Hooper *vs.* California. 155 U. S., 648.

industry in general and recommend legislation to Congress. It has become so settled a fact that corporations will be dishonest that the Bureau of Corporations is largely engaged in the investigation of suspects. Recently the packing industry has been subjected to special sanitary inspection.

The public promotion of commercial interests of private corporations are extensions of the general interest in private enterprise. Thus the Department of State negotiates commercial treaties. Its consular agencies are almost exclusively devoted to commercial interests. The Department of Agriculture has spent approximately \$40,000,000 in ten years in the promotion of agriculture.

Indeed, laws regulating and limiting the possibilities of dealing with one's own property in commerce are increasingly bewildering in their extent and complexity. Thus in 1903 fifteen states regulated weights and measures. Fifty-four laws were passed regulating and licensing trades and occupations. Massachusetts and Minnesota curtailed the use of trading stamps.¹ Twenty states passed laws relating to contagious diseases of animals; thirteen laws were passed relating to warehouses and stockyards. A new national meat inspection bill has been passed (1906) providing inspection of live cattle and carcasses and meat products and the destruction of condemned meats in the presence of the inspector. Thirty-one states legislated concerning adulterations and imitations.

Notwithstanding the multitude of restrictions that have been suggested, it is still perhaps true that "our civilization makes property more sacred than personality."² Only those laborers who own land are protected in their right to live. Limitation of the power to compel service would

¹ *N. Y. Lib. Bul. Leg.*, 22.

² Small, *Am. Journal of Sociology*, i, p. 278.

be the most serious loss to ownership of commerce and industry. The Thirteenth amendment secures labor against involuntary service. Complete ownership being impossible, partial ownership through wages and contract is subject to increasing limitation. Wyoming and Utah laws say: "The rights of labor shall have joint protection through laws calculated to secure to the laborer proper rewards for his services and to promote the industrial welfare of the state."¹ "The wage workers are peculiarly entitled to the encouragement and protection of the law."² Notwithstanding many decisions affected with the idealism of a past generation the tendency of the laws seems to be to dispose effectually of the fiction of freedom of contract. There can be no such thing where contract is based as in our industry, not on equality of status, but on inequality of ownership. Society protects the laborer to some degree from freedom of contract. Contracts for unreasonable length of time will not be sustained by the courts. The codes of Colorado, Montana, North Dakota and South Dakota provide that contracts for personal service are not enforceable against the employe for a longer time than two years.³ It is not easy to enforce a reasonable contract. "The rule, we think is without exception, that equity will not confirm the actual affirmative performance by an employe of merely personal service any more than it will compel the employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. Relief of that character has always been regarded as impracticable."⁴ Practically every state exempts the laborer's wages from attachment or execution for debt and

¹ Cited *Report of Industrial Commission*, v, p. 19.

² President Roosevelt, *Message*, Dec. 1904.

³ Freund, *op. cit.*, p. 480.

⁴ *Ibid.*

makes him on the other hand a preferred creditor.¹ Certain states exempt labor from the operation of the anti-trust law.

Compare the following contracts:

“Know all men by these presents that I, John Koontz of the county of Shenandoah and State of Virginia for and in consideration of the sum of three hundred and seventy-five dollars to me in hand paid before the sealing hereof, having granted, bargained, sold and delivered, and by these presents do grant bargain, sell and deliver unto John Newman of the county and state aforesaid one negro boy named James to have and to hold unto the said John Newman, his heirs, executors and admrs. and assigns the said negro boy James forever, and the said John Koontz for himself, his heirs, executors and admrs. hereby warrants and defends the said negro boy James to the said John Newman, his heirs, etc., sound in body and mind and free from all defects whatsoever, aged sixteen years in September next. Witness my hand and seal this 11th day May, 1830.

Test. John Newman. John Koontz. (Seal.)²

Here is an indenture of 1628:

A husbandman of Surrey county, England, contracts and binds himself to a citizen and iron monger of London to continue “the obedient servant of him, the said Edward hurd, his heirs and assigns, and so by him or them sente transported unto the country and land of Virginia in the parts beyond the seas to be by him or them employde upon his plantation there or and during the space of four yeares, and will be tractable and obedient and a good and faithful

¹ Adams and Sumner, *Labor Problem*, p. 476.

² In the possession of the writer.

servant onst to be in all such things as shall be commanded him. In consideration whereof the said Edward hurd doth covenant that he will transporte and furnishe to the said Logwood to and for Virginia aforesaid and allow unto him sustenance, meat and drink, apparel and other necessarys for his livelihood and sustenance during the said service." This was sealed and delivered in the presence of two witnesses.

A southern negro, who does not at all know what he is doing contracts as follows:

"I agree at all times to be subject to the orders and commands of said or his agents, perform all work required of me. or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right to lock me up for safe keeping, work me under the rules and regulations of his farm and if I should leave his farm or run away he shall have the right to offer and pay a reward of not exceeding \$25 for my capture and return, together with the expenses of the same, which amount so advanced, together with any other indebtedness I may owe at the expiration of the above time, I agree to work out under all rules and regulations of this contract at same wages as above, commencing and ending The said shall have the right to transfer his interest in this contract to any other party and I agree to continue work for said assignee same as the original party of the first part."¹

Passing by agricultural laborers and household servants who are usually engaged on conditions prescribed by cus-

¹ Cited in Ely, *Evolution of Industrial Society*, p. 407.

tom and with liberty usually only at the grace of the employer, a contract of a skilled mechanic may be given:

"I hereby agree in consideration of the Wm. Knabe & Company employing me as polisher at the present scale of wages, that I will discharge my duties in a workmanlike and skillful manner according to the directions of the said company, and that in leaving the employment of the said company, I will give thirty days' notice in writing and if requested sixty days' notice of my intention to leave. I further agree that said company shall have the right to deduct fifteen per cent of each week's wages until the sum shall amount to \$100, which said sum of \$100 shall be retained by the company till the termination of my employment, when it shall be paid to me, provided I shall faithfully keep the terms of this agreement, otherwise all money so deducted shall be considered liquidated damages for the violation of this agreement, and shall belong to the said company. And it is understood that as soon as the deduction from wages as aforesaid shall amount to \$100 the sum shall begin to bear interest at the rate of five per cent, which said interest shall be paid annually, and that said company shall give me thirty days' written notice before making any change in the scale of wages existing at the time of this contract."¹

Whether one sees any analogy between this last contract and the other three depends entirely upon his economic experience. Hence it is idle to draw any. Yet the status of the two parties to the contract is entirely different after the making of the agreement. The employee has sold himself temporarily. The employer gives something much less than personal service in return. When freedom of contract pre-

¹ *International Woodworker*, April, 1902.

vailed in American industry to a greater extent than now, the operatives of New England were working thirteen hours a day. In Connecticut the employees of one factory worked fifteen hours and ten minutes. In Paterson, New Jersey, women and children went to work at half-past four in the morning and if they wearied the master used a lash.¹ It is absurd to speak of the freedom of necessity.

But the employer invokes the courts in behalf of freedom of contract when legislation interferes in his relations with his men. "No state therefore can limit a man's right to sell his labor or to hire labor on his own terms except so far as the good police of society may require."² But such police requires much interference in the relations of industry. Daniel Webster said: "The freest government if it could exist, would not be long acceptable if the tendency of the laws were to create a rapid accumulation of property in few hands, and render the great mass of the population dependent and penniless."³ Stimson notes and classifies approximately 1639 laws passed between 1887 and 1897 affecting labor interests in 43 lines.⁴

Laws in benefit of labor may be divided into those protecting men from oppression in employment, and those tending to secure men in the employment itself. Neither of these objects can be achieved without infringement of the liberty of private property in industry. Hence they become a form of economic property to the laborer.

The health and safety of laborers is sought in a multitude of sanitary and precautionary regulations of factories,

¹ Ely, *Evolution of Ind. Society*, p. 59.

² State vs. Julow, 129 Missouri, 171.

³ Quoted in Loria, *Economic Foundations of Society*, p. 337.

⁴ "Democracy and the Laboring Man," *Atlantic Monthly*, Nov., 1897.

mines and railroads. The government interferes with the laborer's contracting to his own hurt. "A man may contract to use such machinery or to perform dangerous services and have no remedy for injury, but we are not aware that the police power is limited by such contract."¹ "The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand on an equality or where the public health demands that one party to the contract be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all its parts and when an individual's health, safety and welfare are sacrificed or neglected the state must suffer."²

Massachusetts and New York are the most advanced in labor legislation, while more than half the states have such laws and the more distinctly agricultural states are adding to them. These laws usually provide for one or more factory inspectors, who shall have the right to enter and inspect all factories at all times. Laws prescribe fire escapes, dust fans, guards, doors that open outward and the like appliances. Machinery must not be cleaned while in motion, nor by women or minors under a certain age. The engine room must be connected with the machine rooms by tubes; a certain amount of cubic air space must be allowed; walls must be lined or painted; toilet rooms, screened stairways with handrails and many other conveniences and comforts have been prescribed by various laws. Sanitary laws are re-enforced by building laws. Thus in Massachusetts the plans for new factories must be submitted for inspection. Sweat-shop legislation is increasing. Special conditions

¹ *People vs. Smith*, 65 Mo., 382.

² *Holden vs. Hardy*, 169 U. S., 380.

receive special protection. Thus in several states bakeries are particularly restricted. In Wisconsin (1903) the use of cellars is prohibited; proper ventilation, drainage and sanitation is required; sleeping rooms are separated from the store rooms for flour or meal.¹ The mining states have elaborate laws for the construction, ventilation and inspection of mines. Railroads require especial attention. Thus in 1893 the federal law required power brakes, automatic couplers, grab irons or hand holds on freight cars. Between 1885 and 1890 various states required automatic couplers, proper blocking of frogs and switches, bridge guards, safety switches and the like. Illinois (1903) requires street railway companies to provide vestibules or screens on their cars to protect motormen from November to March.

The labor of women and children has always been considered a proper subject of legislation. The hours of women's labor are limited in many states, usually to sixty hours a week, sometimes to forty-eight, as in Wisconsin. Five states prohibit night work by women.² Some prohibit women from certain kinds of work. In 1903 legislation against child labor was strengthened in many states. Thus Illinois limited the hours of labor of children of fourteen to sixteen to eight hours and prohibited employment of children under sixteen in a long list of employments.³ "What with factory and mining and compulsory attendance laws, it may be said that all of the northern states except Delaware try to keep children out of employment during at least a considerable portion of the year till they have reached the age of fourteen years." The attitude of those who would

¹ *N. Y. Lib. Bul. Leg.*, 22 q.

² *Ibid.*, 22q22.

³ Whittelsey, *Factory Legislation*, *Annals of the American Academy*, July, 1902.

have absolute ownership in trade was expressed by Hamilton: ¹ "Women and children are rendered more useful and the latter more early useful" by the protection to home industry.

Some effort has been made to secure men as well from oppression. Workmen are secured from oppressive hours on public works. The hours of men engaged on public works were limited to ten in 1840. In 1868 they were limited to eight. About fifteen states have passed similar laws.² Such legislation is sustained. Some effort has been made to limit the hours of men in private employment. Fifteen states limit the number of hours that railway men may work continuously. The hours of coal miners have been limited to eight in Illinois, Indiana, Ohio and Pennsylvania, and in Utah and Colorado. The Utah eight-hour law was sustained by the United States Supreme Court.³ Thirteen states attempt to regulate the time of wage payments and to prohibit extortion by company stores. Sixteen states outside of New England have passed anti-truck laws. Indiana and Ohio have attempted to prevent the withholding of wages or the imposition of fines by employers for imperfect work.⁴

There is a tendency toward greater liability of employers in case of accident. The English Employers' Liability Act to extend employer's liability to workmen for injuries has been copied in many states. This abrogates the former fellow servant doctrine by which an employe might have no compensation for injury by a fellow employe. Some states forbid "contracting out" of this liability. Thus

¹ *Report on Manufactures*, 1791.

² Adams and Sumner, *op. cit.*, p. 410.

³ *Holden vs. Hardy*, 169 U. S., 397.

⁴ Whittelsey, *op. cit.*, p. 237.

Maryland (1903) makes the employer liable in every case where the workman is not at fault. Ohio (1904) does away with the common law rule that the employer is not liable for negligence when the employe continues in the employment with knowledge of the neglect on the part of the employer.¹ A national act (1906) provides: "In all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

There are indications of the establishment of some claim to employment. If so, this would be a partial right in ownership of industry corresponding to tenant rights in land. Massachusetts says: "A person who being engaged in manufacturing, requires from persons in his employ, under penalty of forfeiture of a part of the wages earned by them, a notice of intention to leave such employ shall be liable to a like forfeiture if without similar notice, he discharge a person in his employ."² There are similar laws in other states. Laws of like effect are those against alien contract labor.

An effective instrument of control over their employment in the hands of laborers is the strike. It is estimated that 50.77 per cent of strikes have succeeded and 13.14 per cent have been partially successful.³ In 1905 there were 1157

¹ *N. Y. Lib. Bul. Leg.*, 22 q6.

² *Mass. Labor Laws*, ch. 106, sec. 10.

³ Ely, *Evol. of Ind. Society*, p. 114.

strikes of which 458 were won, 79 were compromised and 210 were lost.¹ In early English and American decisions all strikes were held to be criminal conspiracy. Now it is lawful for unions to do anything which an individual may do. Fifteen states secure the right to strike by statutes. Thus in California (1903) the right of workmen to combine in unions and to strike was guaranteed by a statute that an agreement between employers or employes shall not be deemed a conspiracy if it would be legal if performed by individuals.² Blacklisting by employers is forbidden in twenty-seven states. A few states have required that the cause of discharge be furnished to the employe in writing. The right of organization is legally sustained. It is made a misdemeanor to make membership in unions a bar to employment in several states, as in Kansas, Nevada and Oregon in 1903.³ Political intimidation is a misdemeanor in some states. Most states legally recognize the "union labels" placed on manufactured goods for "fair work." Nevada and Montana require the state printing to have the union label.

Partial rights are established by means of state conciliation and arbitration. At the beginning of the year 1905 twenty-four states had passed laws for industrial arbitration, the earliest being Maryland in 1878. National boards for voluntary arbitration (1888 and 1898) in disputes affecting interstate commerce have been ineffectual. The governors of the two leading industrial states, New York and Pennsylvania (1903) recommended compulsory arbitration. But the National Civic Federation has been influential in hundreds of conciliations through its commit-

¹ *American Federation of Labor, 25th Annual Report.*

² *N. Y. Lib. Bul. Leg.*, 22q15.

³ *Ibid.*

tee of twelve influential men representing capital, labor and the public.

Indirectly a claim is established on employment by the ability of unions to establish the closed shop; and also by the recognition and negotiation now general between industrial corporations and unions. Burns, former President of the Wall Paper Association, testified that combinations aid the unions in enforcing demands,¹ and the volume of testimony before the Industrial Commission indicates marked gains to labor through organizations. The influence of some of the leaders suggests the Roman tribunes, who by continued intervention in behalf of the populace, gained a veto; or shall we call the heads of the Civic Federation our *tribuni plebis*?

Collective bargaining with the unions recognizes the right or at any rate the power of the voice of wage earners in determining the conditions of their labor. Both sides organize. National executive officers of the unions take up with the employers or organizations of employers the matter in dispute. Thus in Illinois the coal operators maintain a commission which with the executive of the miners' organization considers disputes not otherwise arbitrated.

Employers' associations of another kind must be reckoned with as an institution tending to industrial classification in whatever may be the coming form of estate, and tending to the limitation of individual industrial ownership. There are 500 such organizations in the United States, most of them affiliated with the Citizens' Industrial Association of America (1903), which seeks, inconsistently enough, through offensive and defensive organization of industrial management, to maintain individualism

¹ *Industrial Commission Report*, xix, 623.

in industrial service; in their own words, "to loose the damnable steel manacles cruelly locked on the hands of the common man and his wife and children" by labor unions and to "protect the common people from the oppression of the labor trust."¹ Associations for collective bargaining tend to industrial classification or estate by recognition; the fatuous employers' associations accelerate the same tendencies by antagonism.

Whether the union movement be viewed as cause or effect of the trend toward co-operation, its strength belongs to the last quarter of the century, the time of general limitation of ownership. The Knights of Labor, organized without reference to specific interests, naturally gave way in influence to the American Federation of Labor (1881) which is organized by trades and has nearly two million members. It is proposed to incorporate labor unions. In so far as this might increase economic responsibility and security it would enhance the partial right in ownership which is the virtual aim of such organizations. The benefit funds of the unions and their fraternal and insurance features must tend to economic security, or property. Thus in 1905 the international organizations of the American Federation of Labor paid \$742,421 in death benefits; \$582,874 in sick benefits and \$85,050 in unemployed benefits.²

Perhaps the national classification into industrial estates is contributed to by the bureaus of labor statistics in most of the states and by the free employment bureaus of thirteen states.

The extent of the effectiveness of all these limitations of corporate liberty must not be overestimated: corporate limitation is perhaps only incipient, and laws only prophetic.

¹ Advertisement, *Chicago Record-Herald*, July 4, 1906.

² 25th Annual Report, *Am. Fed. Labor*.

The Industrial Commission reports that very little of the anti-trust legislation has been effective.¹ Laws at least indicate the height of the possible liberty of that at which they are directed. Thus of 318 corporations of the size known as trusts existing in 1904, 236 had been incorporated since 1898 with a capital of \$6,049,618,223 as compared with a capital of \$1,196,724,310 of those incorporated before 1898. Thus the anti-trust legislation preceded rather than followed the trust movement.² The Attorney General of the Standard Oil Company said: "A modern federal law also exists which literally interpreted forbids business of any magnitude, but federal judges have thus far found it easier to dismiss proceedings under it than to guess at its real meaning."³ President Roosevelt says:⁴ "The interstate commerce law in the matter of rebates was practically a dead letter." Land commissioners who aid in fraud, inspectors who do not inspect, commissioners and investigators whose chief function is to shield the guilty are familiar phenomena. The labor laws also in many cases are unenforced and unsustained in the courts. "The percentage of reversals on appeal in master and servant cases when the verdict of the juries of the courts below had been in plaintiff's favor is perhaps larger than in any other branch of litigation."⁵ However it is probable that the chief influence of reactionary decisions is to strengthen the dependence of labor upon its own defense.

These direct modifications of ownership are supplemented

¹ xix, p. 641.

² Moody, *Truth about the Trusts*, p. 486.

³ Quoted in Ghent, *Benevolent Feudalism*, p. 35.

⁴ *Letter to Secretary Morton*, June 22, 1905.

⁵ "Courts and Factory Legislation," in *Am. Journal of Sociology*, Nov., 1900.

by various institutions and social movements in amelioration of bad distribution. The increase of population and the concentration of private property are attended by a rapid extension of public charities, public ownership, profit-sharing, stock ownership, co-operative association, insurance, corporate provision for the welfare of dependents and private philanthropy—all charges on existing private property or limitations of its future possibility and content. These indicate drift to estate. These limitations may be classed according to their agencies, as public, corporate and private.

Public limitations are public charity and public ownership. Pensions have increased from \$15,525,153.11 in 1866 to \$141,142,861.33 in 1905.¹ In 1903 alone legislation provided for fifteen new state charitable institutions in twelve states including an insane hospital, institutions for the feeble-minded, reform schools, an institution for the adult blind, a school for the blind, sanatoriums for consumptives, general hospitals, homes for miners, homes for orphans and an institution for the treatment of hydrophobia.² In 1903 the total cost of maintaining public benevolent institutions was \$16,263,958 or 29.3 per cent of the total expenditure for such institutions.³ Public charity is a charge upon property rather than upon affection. Such involuntary philanthropy is one of the costs of private opulence, one of the conditions of the quiescence of the indigent. Philanthropy in this giving is like the *love bene* of the serf to his master, which ultimately became a tax, or like the benevolence of King Charles, which became compulsory; only that now the sovereignty is popular. These customary benevolences become

¹ *Statistical Abstract*, 1905, p. 603.

² *N. Y. Lib. Bul. Leg.*, 2212.

³ *Census Bulletin of Charities*, 1906.

obligations on private property, which diminish the "indefinite residuum," and might not be disallowed by any considerable section of society without peril. In its receiving of the benevolences the people are like the Roman proletariat which was fed from the public treasury. This was a repayment of the taxes paid by the many to a few.

Besides exacting benevolence society may exact facility of its public services. The state assumes the service or limits the franchise of the monopoly. Twenty years is a customary franchise. Of fifty larger cities only three have privately owned sewers. Of publicly owned electric light systems there were 20 in 1892 and 400 in 1898.¹ In 1902 22.5 per cent were municipal.² In 1902 70.4 per cent of water systems in cities of over 38,000 population belonged to the municipality and 54.2 per cent in all cities.³ Boston and New York have constructed important underground railways, which however are leased to private companies. Illinois (1903) authorized its cities to own and operate street railways. The municipal election of Chicago, April 4, 1906 presented four candidates for mayor, each on a municipal ownership platform. Missouri (1903) allows all municipalities of less than 30,000 population to undertake any public utility. Kansas (1903) authorizes cities of less than 15,000 population to own waterworks, gas, oil and electric plants, secured by bonds issued on a vote of the electors.⁴ California (1903) gives authority to maintain waterworks, wharves, street railways, telephones, telegraph lines and lighting and heating plants.⁴ Chicago provides municipal parks and recreation centers in its crowded sections, fourteen of these on the south side having been opened at an

¹ Bemis, *Municipal Monopolies*, p. 673.

² *N. Y. Lib. Bul. Leg.*, 22v19.

³ *Ibid.*, 22v18.

⁴ *Ibid.*, 22v21.

initial expense of \$75,000 each and maintained at an average annual expense of \$30,000, providing entirely free playgrounds, swimming pools, baths, indoors and outdoors, with clothes and towels, gymnasiums and club rooms and a refectory with small charges. Municipal improvements especially illustrate the social power over private property. Thus Virginia allows improvements to be paid for by special assessments, in some cases to be ordered by two-thirds of all the members of a council after notice and a hearing to the land owners.¹

Voluntary corporate limitations are profit sharing and stock ownership by dependents and small investors; provision for the welfare of dependents and various forms of co-operative associations. Thus the United States Steel Corporation distributed over \$500,000 to officials who attracted attention during 1904. The same corporation proposed to distribute among its men one per cent of net earnings, if during the year there were between \$80,000,000 and \$90,000,000 of profits, and to increase the sum one-fifth per cent for every \$10,000,000 added to the earnings.² Seven hundred and eleven laborers owned stock of \$245,200 in the Illinois Central Railroad in 1902.³ The Proctor and Gamble Company pays a profit sharing dividend at the same time as the dividend on common stock and this dividend is equal to a dividend on an amount of stock corresponding to the salary.⁴ The N. O. Nelson Company of St. Louis, distributes profits in equal percentage to capital, skill and labor. The varied systems of profit sharing have developed in the later period of general limitation

¹ *N. Y. Lib. Bul. Leg.*, 22v15.

² *New York Herald*, Feb. 1, 1905.

³ Bolen, *Getting a Living*, p. 116.

⁴ Adams and Sumner, *The Labor Problem*, p. 341.

of ownership. There are now about fourteen such plans in operation.¹ These seem to be a sharing in industrial control; but labor leaders deny this.

Although ownership is not fairly distributed among the stockholders of corporations, there are said to be 950,000 stockholders and 300,000 bondholders of the railroads alone. The Steel Corporation has 90,000 stockholders.² There are 9,123 shareholders in the Illinois Central Railroad, of whom 7,174 have less than one hundred shares each. The Pennsylvania Railroad is said to have 44,500 owners.³ The American Express Company, founded by two or three men, had in 1892, 6,882 stockholders.⁴ The Western Union Telegraph Company had 1701 stockholders in 1881 and 12,242 in 1904; the Standard Oil Company had 45 stockholders at first and 4000 in 1901; the Sugar Trust had 250 in 1885 and 11,000 in 1905.⁵ The number of stockholders in national banks increased from 146,000 in 1876 to 330,124 in 1905.⁶ Savings banks own \$442,354,086 in railroads; colleges own \$47,468,317; fire insurance companies \$15,756,249; and life insurance companies \$668,262,896.⁷ Thus the form of a diffused estate seems to be provided. The property of this nature is to most stockholders an attenuated property, in the hands of agents. It remains to devise a plan for making those agents real agents instead of majority stockholders with power to act chiefly in their own interest. Such corporate ownership might be known as representative or republican ownership.

¹ Adams and Sumner, *op. cit.*, p. 359.

² Wellman, in *Review of Reviews*, xxvii, p. 330.

³ *Social Progress*, 1905.

⁴ Talcott Williams, in *Social Progress*, p. 292.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Newcomb, *Who Owns the Railroads?* p. 8.

Such possible diffused ownership of corporations is anticipated and perhaps accelerated by co-operative associations, which, theoretically, are without the membership of "dominant interests." Co-operation is democratic distribution, or production, or use of credit as in building and loan associations. In 1904 there were 5,350 building associations in the United States with a membership of 1,566,700 and assets of \$599,550,855.¹ In 1904 there were about 200 distributive co-operative stores in the United States.² Besides communistic settlements there have been during the past forty years about 200 experiments in producers' co-operation. Besides the property co-operation there are associations of producers of every sort, such as the National Live Stock Association. These perhaps are an incipient form of estate, that may in time supplant the individually controlled corporations.

The most notable form of co-operative commercial property is insurance. A life insurance policy is property.³ Such property has increased from \$5 for each person in the United States in 1850 to \$85 in 1901.⁴ The insurance in force was increased from 29,407 policies in 1850 to 21,182,143 in 1904; from \$68,614,189 to \$12,547,937,441.⁵ All the manufacturing capital in the United States is estimated at \$11,797,783,800 and the railroad capital at \$12,599,990,258.⁶ There were 15,674,384 industrial insurance policies in force⁷ compared with 7,696,229 savings bank accounts,

¹ *Statistical Abstract*, 1905, p. 122.

² Adams and Sumner, *op. cit.*, p. 402.

³ *Ionia Co. Savings Bank vs. McLean*, 84 Mich., 629.

⁴ Anderson, in *Annals Am. Acad.*, Nov., 1904.

⁵ *Statistical Abstract*, 1905, p. 123.

⁶ *Annals Am. Acad.*, Sept., 1905, p. 33.

⁷ *Statistical Abstract*, 1905, p. 123.

the policies were for \$2,135,859,103 and the deposits were \$3,269,236,119.¹ The assets of life insurance companies were \$2,498,960,968 in 1904 as compared with \$387,000,000 in 1874.² The deposit currency of the country in the same year was \$3,908,509,152.³ The realization of the enormous sums represented in these policies must have some influence in the future distribution of ownership. They represent not merely savings but investment. Thus \$2,000,000,000 of assets of insurance companies were invested; in bonds, 40 per cent; in mortgages, 27 per cent; in real estate, 8 per cent; in stocks, $7\frac{1}{4}$ per cent; in personal notes, 7 per cent; in cash, $4\frac{3}{4}$ per cent; in collateral loans, 3 per cent; other investments, 3 per cent. The amount equals 40 per cent of the value of American farm products.⁴ Some influence must be allowed to the fraternal insurance organizations, with their defiance of mathematics. These date from the A. O. U. W. of 1868. Such orders have 8,278,719 members. One hundred and fifty of these orders have promised to pay \$6,000,000 of insurance.⁵ Accident insurance, dating from the Hartford Travellers, 1863, paid in 1904, \$19,332,539 of insurance.⁶

With the social industrial functions which they assume many corporations accept the functions of charity, and so place upon other corporations the burden of future imitation. The assumption of any obligation beyond the contract obscures the outlines of contract. Thus when the workingman's soul is a charge upon the conscience, and more particularly upon the funds of his master, the estate of the workman increases. When the master invests

¹ *Statistical Abstract*, 1905, p. 116.

² *Ibid.*, p. 123.

³ *Ibid.*, p. 114.

⁴ *Annals Am. Acad.*, Sept., 1905, p. 85.

⁵ *Ibid.*, Nov., 1904, Abt. Landis.

⁶ *Statistical Abstract*, 1905, p. 124.

in the ease as well as the labor of his man, he has admitted the personality of the laborer as an accepted infringement of the orbit of his ownership. The list of welfare undertakings now in force in various establishments is long, and welfare directors, social secretaries and sociological departments are necessary to superintend the gardens, the educational and industrial classes, the social clubs, the theaters, the schools for children, the cost-price lunch rooms, the gymnasiums, the medical departments, the libraries, flower funds, the sick benefits and picnic parties and a hundred things, not the least of which is the advertising of the philanthropic department. There are numerous relief and pension systems in force in industries, particularly the railroads. The Baltimore and Ohio Railroad in 1884 instituted an old age pension system. Other great corporations have insurance systems of various kinds. The Pennsylvania Railroad allowed pensions to retired employes in the six years ending December 31, 1905, \$2,004,087.59.¹

Private philanthropy is active in the repair of bad distribution and possibly effects redistribution in so far as it has effects beyond immediately individual relief. Of a total of 4,207 benevolent institutions in the United States 2,359 are private and 1,363 are ecclesiastical. The three classes cost respectively in 1903: public, \$16,263,958 or 29.3 per cent; private, \$24,163,099 or 43.5 per cent; ecclesiastical \$15,150,576 or 27.2 per cent. Of these 2,004 have been founded since 1890.² In Pennsylvania \$500,000,000 of capital is invested in charitable institutions, or one-half the value of farming property or one-third of the value of manufacturing establishments.³ Twenty-nine per cent of the

¹ *Report of the Penna. Railroad Pension Department.*

² *Census Bulletin on Charities*, 1906.

³ *Social Progress*, 1905, p. 98.

population of New York applied for aid in 1897.¹ Legal charity makes the status of the dependent more definite. Since the organization of the first Charity Organization Society (London, 1869) two hundred such societies have been organized in the United States.² Four hundred and seventy-five Y. M. C. A. buildings have been maintained at an expense of \$26,260,870.³ One hundred and fifteen social settlements have cost \$2,652,900.⁴ Seventy-nine million dollars have been invested in institutional churches.⁵ The benefactions, individual, religious, educational and charitable in the United States in 1904, exclusive of public appropriations, denominational or missionary contributions and of items of less than \$5,000 were over \$90,000,000.⁶ The total of such benefactions for the years 1893 to 1904 is \$696,000,000.⁷ Notable recent gifts are that of John D. Rockefeller for tuberculosis study, \$7,000,000; and for the educational fund \$32,000,000; and Andrew Carnegie's pension fund of \$10,000,000 for college teachers. It is estimated that the benefactions of the latter have amounted to \$120,500,000.

Private property becomes "clothed with a public interest" when it is directed to public uses and thus creates a public interest or property. Savigny says: "Property is founded on adverse possession matured by prescription." So concession is matured by prescription. A demand satisfied is a demand stimulated. Voluntary stewardship may become legal and political obligation. Of charity Aristotle said:⁸ "The poor are always receiving and always want-

¹ *Social Progress*, 1905, p. 96.

² Devine, in *Social Progress*, 1905, p. 140.

³ *Social Progress*, 1905, p. 311.

⁴ *Ibid.*, p. 299.

⁵ *Ibid.*, p. 209.

⁶ *Ibid.*, p. 255.

⁷ *Ibid.*, p. 186.

⁸ *Politics*, vi, 5.

ing more and more, for such help is like water poured into a leaky cask." In this the poor are very like the rich. Concession to the poor in any way may become a public partial right in private property, particularly in corporate property. So long as the dispossessed continue to live and multiply they must be a charge, legal and moral, directly or indirectly on existing ownership, an incident of estate, which isolated individuals may flout, but with which, nevertheless, ownership as a whole is compelled to account, for its own continuance and security. Individual irresponsibility to society is tolerated only as it is isolated. If there is in the United States, as Leroy-Beaulieu and Marshall ¹ think there is in Europe, an increase of the wealth of the poorer classes relatively to the richer, while practically all available and valuable wealth is with its increase in theory privately owned, the increase of the security of the poor must be a gain in part of some sort of estate, before there can be a diffused private property. Evidently private property is still in the ascendant. It is hard to demonstrate its continuance in its present form from statistics. The Census shows that less than one-half of the families owned homes and one-third of these are mortgaged. The wealth of the United States is variously estimated at from \$90,000,000,000 (Census) to \$110,000,000,000.² \$18,000,000,000 is agricultural wealth individually owned. Corporations own wealth of more than \$25,000,000,000. It is estimated that, leaving out of consideration city real estate, corporations own more than half of American wealth, while one hundred years ago they owned but one per cent of the wealth.³ It is said that one-twelfth of the wealth of the United States

¹ *Principles of Economics*, i, p. 735.

² Harvey, in *World's Work*, Feb., 1905.

³ Williams, *Social Progress*, 1905, p. 292.

is represented at the meeting of the board of directors of the United States Steel Corporation, who control corporations capitalized at \$9,000,000,000.¹ The multiplication and the extension of the forms of partial ownership recited in this chapter seem to indicate some socializing of the centralized control of industry.

Limitation of the common tolerance and existence of license has been shown in the active disapprobation of slavery, in the increasing reflection on the "unearned increment," and in the increasing subtraction from the "indefinite residuum" of private property both in land and in capital; and lately by something of revulsion from the commercial spirit hitherto dominant, something of the Greek repulsion for the sordidness of trade that made Plato say that one might be punished for sharing in the illiberality of retail trade. The police power, applying the term to the promotion of the public welfare through restraints upon the use of property, is a growth of the last quarter of a century. Almost none of the thousands of cases and statutes cited in Freund, *The Police Power*, had their origin before the Civil War. With increase of mass, the freedom of the individuals is in the latter half of our national history, speaking roughly, decreased by the struggle for equality, the "infringement of orbit," the Spencerian integration of a new unity, which portends possibly some juster distribution. After the culmination, under a centralized government, of the greatest allowable liberty, the efforts to prevent the destruction of the liberty attained, the many limitations herein considered, constitute a new centralization of government, which might be prophetic of a new liberty, a new individualistic period lying beyond any imminent limitation. This new centralization seems to be shown in

¹ Pratt, in *World's Work*, Dec., 1904.

the recent national legislation on inspection of foods, on labor and railways, and the like.

Real liberty, measured quantitatively, or by the numbers enjoying a degree of freedom, has increased through all the periods, perhaps, whether they have here been called periods of liberty or of limitation. Each period of liberty results in limitation, which conditions the new liberty. The possession of the savage was not liberty; it had no sanction but his own security. In the communism of the next period the individual had only the uncertain guarantee of the clan. Patriarchal ownership long had no sanction save that of the family. The Roman individual property was never fully extricated from the *patria potestas*. The private property of ancient times had not the guarantee of a democratic national unity. The security of the Empire—of mere personal government—was not as great as that of the state conceived as the people. The Greek Four Hundred confiscated property with less indirection than the modern “four hundred.” At almost no time was the right to own property conceded equally to all classes within the state. Feudalism in its outcome meant greater security for the mass. Modern liberty of ownership has the sanction of more democratic unity. The internal integration of society as the great nations gird themselves for the commercial struggle will again give the mass greater security, more harmonious social adjustment, which is the only liberty possible in society. The status of the individual has now less the sanction of the lord and more the sanction of society. The lords are not the masters but the servants of society. One era of status sacrificed the individual. One era of private property sacrificed society. The only possible general liberty is in balance of the two.

If the recital of facts indicative of a more co-operative social adjustment seems to be too definitely explained as

estate this too great boldness may be offset by the deduction from history that no period of ownership has been characterized by the exclusive prevalence of one form of ownership, and further by the fact that a higher degree of evolution is productive of a greater variety of forms. Hence if a new regime is foreshadowed, it may be one of equilibrium not only between individual parts of society, but between competitive and socialized functions, perhaps between private property and estate.

CHAPTER XI

THE ETHICS OF OWNERSHIP

THE data of this essay may be insufficient to show an alternation of the forms of private property and estate; but there can be no doubt that legal restriction is an inherent fact in ownership, that, strictly speaking there is no private property. Augustinus Triumphus said:¹ "Private property ceases to be such by natural law in case of necessity, by divine law for the sake of charity, by the civil law for the benefit of the state." Laws, however, are not so much the cause as the epitome of economic evolution. Plato said:² "Those are the most amusing people in the world who imagine that with their everlasting enactments and amendments they will find some way of putting down the knaveries that are practiced in contracts, little thinking that they are in reality only cutting off the heads of a hydra." Yet where there is no restriction there is no law.

Limitation of private ownership is not only historically and legally necessary, but it is a corollary to all theories of the right of property. The fundamental theory of the right of property, that it is a human necessity, is variously called the natural right, or the human nature, or the divine right theory. Thus Kant and Hegel and Green regard the being a man a sufficient title to property. But given many men and small substance, human nature and divine right cannot be monopolized without the infringement of an equal or potentially equal title. The "labor" and the "robbery and

¹ Dunning, W. A., *Political Theories*, p. 219.

² *Republic*, ix, 426.

violence" and the "occupancy" theories are theories of appropriation. Locke would give to the laborer the work of his own hand which he actually uses. But to be rich one must use the labor of others. Mill says:¹ "The laws of property have never yet conformed to the principles on which this justification of private property rests." Proudhon would not allow that wrong can be made right by prescription. Blackstone and Grotius and Savigny regard occupancy as a title. Upon these theories the limitation of past occupancy by present occupancy might be justified. Ownership of the present day worldwide commercial properties by occupancy would be an attenuated position. It is now not man but money that occupies. The "legal evolution or utility" theory refers to a stage subsequent to necessity and appropriation. Property is a creature of law, which furnishes its ethical basis. "Banish governments from the earth and all its fruits are as much the common property of all mankind as the air and light," says Bossuet. "The inequality that now is has been introduced by the lawes civill," says Leviathan.² The Servian code says: "Property is based on civil law, not on natural rights, on public utility of which law is the expression, not on abstract justice."³ Property is not in having but in being allowed to have. If property is the subject of law it is subject to limitation.

The academic theory of distribution among the factors of production according to their productivity leaves unconsidered the actual distribution among individuals. It is therefore liable to misinterpretation as a justification of inequality of ownership. Capital is not a personality. Consequently in a distribution among men it is not entitled

¹ *Political Economy*, bk. i.

² I: 63.

³ Quoted in Gide, *Political Economy*, p. 453.

to receive anything. It is not capital that receives the return for its productive use, but the owner of capital. Since capital accumulates while men decay, the ownership of capital to the second generation must find some other justification than its productivity. When it is determined that capital produces so much and labor produces so much, and that capital accordingly should receive so much and labor so much, the laborer accepts the logic; but since capital is the product of labor alone he claims the title to it, and denies the title of those who have not labored. The laborer does not claim the product for larger consumption alone, although the larger ownership conceded to the capitalist is usually so applied in part, but for economic security and power, just as the capitalist wishes it. This security, and not enjoyment, is the chief motive of ownership. In a period of enlightenment it seems probable that greater productivity would result from a better distribution of motive. Thus adequate examination might show that both the theories of property and the economic theory of distribution require the limitation of private property.

If, however, private property is conceived to be absolute, undelegated privilege, the spirit of ownership is arrogant, elementary, bestial. Lord Raoul of France may ride among his discontented villains and reason:

“Now, dear knave,
Be kind and tell me—tell me quickly, too—
Some proper, reasonable ground or cause—
Nay, tell me but some shadow of some cause—
Nay, hint me but a thin ghost’s dream of cause—
(So will I thee absolve from being whipped)
Why I, Lord Raoul, should turn my horse aside
From riding by yon pitiful villain gang—
Or ay, by God, from riding o’er their heads,
If so my humor serve, or through their bodies,
Or miring fetlocks in their nasty brains,
Or doing aught else I will in my Clermont.”¹

¹ Lanier, Sidney, *The Jacquerie*.

Some millionaire religionist will spiritualize Raoul and say that the toiling multitude is the thorny stock that bears a rose. But the rose now begins to know whose sap flows in his petals, and to confess that the thorny stock has a property in his hues. Raoul has ceased to swagger, has changed from unconciliatory usage of subjects to covert sedition against masters. He is professing, perhaps, to hold his realm as the steward of his subjects. Stewardship, private initiative, supplements the law and the logic of social limitation. "The ambition to so assist in readjusting industrial relations that manhood may not be held less deserving of conservation than property,"¹ is not confined to the maladjusted. Many of the chief beneficiaries of the social undistribution inquire sincerely what they can do, without reasoning in academic fashion about the consequences of their doing. "I believe that a divine discontent should enter the breast of every man who does not have a chance at all the privileges that other men enjoy."² Mr. Carnegie's gospel is this: "To set an example of modest, unostentatious living, shunning display or extravagance, to provide modestly for the legitimate wants of those dependent upon him and after so doing, to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer in the manner which, in his judgment is best calculated to produce the most beneficial results for the community—the man of wealth thus becoming the mere trustee and agent for his poorer brethren, bringing to their service his superior wisdom, experience and ability to administer." "A public sentiment is rapidly forming which views as a reproach a very rich man who lives or living dies without connecting himself and his name

¹ Small, in *Am. Journal of Sociology*, i, p. 571.

² *New York Times*, Dec. 7, 1905.

and memory by substantial benefactions with works educational, philanthropic or charitable, for the benefit and welfare of his fellow men." ¹ "There is no absolute ownership in fee simple from the ethical standpoint." ² Private property becomes a public trust. Thus Cecil Rhodes conceived political obligations of wealth. Another South African millionaire left money for the construction of a railroad. Pedro Alvarado in Mexico proposed to give \$50,000,000 toward the payment of the debt of the Mexican Republic, because he took his millions out of the ground. Another rich man says: "The rights and interests of the laboring men will be looked after and cared for not by the agitators but by the Christian men to whom God in his infinite wisdom has given the control of the property interests of the country." The Lord is usually charged a rather high brokerage by his stewards; but these sentiments indicate an ethical sense. The best example of stewardship at hand is that of Professor S. M. Babcock, of Wisconsin, who declined to take patents on his inventions, which, especially the "Babcock Milk Test," are worth millions annually to the farmers, because he thought as a public servant he ought to give the general public the benefit. The advantage of this sort of stewardship is that it prevents problems as well as contributes to their solution.

Although the part of the church in economic affairs has always, perhaps, been that of the conservation of any existing regime, the ethical basis of stewardship is easily found in the words of its leaders. Paul said: ³ "And whether one member suffer all the members suffer with it." He had perhaps been reading Plato: "In a well ordered state the whole of society must feel the pleasures or pains

¹ Dillon, in *Am. Law Review*, xxix, 188.

² Iles, in *Century*, March, 1897.

³ *1 Cor.* 12: 26.

of each of its members." Aquinas said: "The possession of riches is not unlawful if the order of reason is observed; that is to say that a man possess justly what he owns and that he use it in a proper manner for himself and others." St. Ambrose said: "The earth has been given to us in common. Why, O rich men, do you arrogate property to yourselves alone?" Bossuet said: "O rich men of today, if we go back to the beginning of things we shall find that the poor have not less right than you to the goods you possess."

Aristotle states the principle of distribution: "It is clearly better that property should be private but the use of it common."¹ Sir Frederick Pollock² repeats Aristotle: "How to foster and maintain a state of generous friendship in which a man shall give and take in turn of the good things of life so that property shall in effect be several in title but common in use, that is the high social problem which the communist evades and the true statesman must attack."

Law and thought and philanthropy are not ineffectual agents of progress. Hence the certainty of economic transformation by the evolution of property need not preclude expectant opportunism. Universal acquiescence would delay amelioration. One may enter the councils of the doctors of the diseased social body, see the doctors of the old school apply heat to the congestion and ice packs to the head and feet, while administering soperifics. The patent nostrum vendor is fond of bleeding and blisters; the osteopath suggests friction—more competition. The mental science man proposes "economic property"—a mental substitute for actual property, and the faith-cure man cures

¹ *Politics*, ii, 8.

² *History of the Science of Politics*, p. 23.

the patient's desire for cure and makes him prefer death here and fullness of life hereafter. Any social solution is idle that assumes the possibility of a stable equilibrium of inequality, while human desire is a motive and imitation is a method. "The difference between man and man is not so considerable that one man can thereupon claim to himself any benefit to which another may not pretend as well as he." "What do you suppose will satisfy the soul but to walk free and own no superior." Notwithstanding Aristotle's dictum that it is more important to equalize desires than property; notwithstanding the power of poverty to substitute stolidity for the first pain of deprivation; notwithstanding that habit is the great balance wheel of society—desire for economic equality persists as a motive and a force. Conservatism of the fortunate can never quell the desire of the poor, nor redundancy diminish the appetite of the rich. As to the solutions just cited, "free and fair competition" is like a fair fight between the new-hatched chicken and the hawk. "Competition" as now used by economists is highly diluted with its opposite. The *meum* of "economic property" may be found less satisfying than the cove oysters and caviare of the *tuum*. The wind—if only the wind of envy—may whistle through the *meum* of "economic property" while the *tuum* is purple and fine linen. Nevertheless if the prevision of the doctors runs with destiny their measures may accelerate its operations. It makes little difference in the outcome whether the contribution be one of amelioration or of irritation.

The complacency of science can accept with equal cheer the sanguineness of socialism or the impotency of individualism. Comte says: "Le profond sentiment des lois qui régissent les divers genres des phénomènes peut seul inspirer une véritable résignation, c'est à dire une disposition à supporter avec constance et sans espoir des compensations

des maux inévitables." Without being either alarmed or restrained by the possibility or the impossibility of socialism, whether that has to one an ideal or a sinister sound, "the state may realize for society the benefits of monopoly."¹

A wise opportunism is supported and indeed compelled by the inevitableness of change. The Charleston Courier said: "Ages must roll into the eternity of the past before any general scheme of emancipation can be attempted with the remotest probability of success."² Yet the fundamental form of ownership was quickly changed. Gladstone said:³ "I freely own that compulsory expropriation is a thing which is admissible and even sound in principle." Herbert Spencer said:⁴ "So it seems possible that the primitive ownership of land by the community, which with the development of coercive institutions lapsed in large measure or wholly into private ownership, will be revived as industrialism further develops." "It seems reasonable to assume that with each increment in the social product the people will conceive it to be to their advantage to invest added sums in the machinery of government."⁵ "The time will come when men will perceive that it is as monstrous for a father to bequeath to his son a controlling interest in a factory or a railroad as it would be now for the president of the United States to give to his daughter the city of New York as a dowry."⁶ Instead the president is proposing a limitation of the size of fortunes.

¹ Adams, *Relation of the State to Industrial Action*, p. 47.

² Quoted in Von Holst, *op. cit.*, ii, p. 118.

³ Quoted in Bliss's *Encyclopedia of Social Reform*, p. 803

⁴ *Sociology*, ii, pp. 643-4.

⁵ Adams, *Finance*, p. 39.

⁶ Small, *Am. Journal of Sociology*, Jan., 1896.

The indirect confiscations of the law, the diminution of private ownership by co-operative effort, the concessions of stewardship might conceivably produce a form of estate in which the relation of holders should be one of mutual security and support, instead of, as at present, a gradation of subjections in which the contributions of the less to the greater exceed the contributions of the greater to the less. The signs of equality in such estate are, however, illusory. And it must not be forgotten in this speculation that history is not logic. As one period has been characterized by *patria-potestas*, one by contract, one by fealty, one by liberty, the approaching period of balanced rights may be one characterized by equality. This "equality," however, like the "liberty" of the past, can be only a word of faith, not of much actuality. This period may prelude one beyond in which fraternity shall succeed liberty and equality as creeds. But this is beyond the prevision of the present moral elevation of society.

If there is to be a rebalancing of ownership in which the sanctions of economic and legal force shall yield in some small degree to the sanction of mutual satisfaction, what shall the new estate be called? Nostrism? Idemism? Quisquism? Quilibetism? "Individualism" in its former sense has passed away, although the satisfaction of the individual is the hope of every ism. "Altruism" is the flower, but not the root of society. "New Feudalism" is not applicable. There is no fealty; the "mesne lord" holds of his vassals. Because in the account of ownership here glimmered forth, contest is more potent than voluntary concession, co-operation is also too good a word. "Militarism," the regimentation of society, is of too narrow implication. Socialism is an alarming word. Mutualism is a "symbiosis in which two organisms living together, mutually and permanently help and support one another." This

seems good, but describes more than probability. Perhaps "humanism" will sometime acquire sufficient popular content to name the period, since the recognition and realization of humanity as an end is its chief theoretical characteristic. Under the prevalence of the stewardship idea, of the conception of delegated sovereignty in industry as in politics, the present state of industry seems to approach the republican form rather than the democratic. Hence "industrial democracy" will not do, for there is little probability of democratic management in industry and less capacity for it. "Populism" has not the implication of the subjection of the individual to society that is ascribed to socialism, but it is disreputable and suggests the Roman "populares" as opposed to the "optimates." The problem is to find some word which could mean the same thing without being suspected by the privileged.

Since no past stage of ownership is separable in fact or in name from the accompanying stage of political organization, unless it be the artificial separation of the laissez-faire period; since economic status is the determinant of political power, it is difficult to find two names for the same thing, representative government in politics and in industry. As feudalism names both the economic and the political period of the past so republicanism may finally name the approaching age. But an economic stage is not an ism, and time must name it, however useful it might be to pack its theory into a word.

Ameliorative measures may then be mediated without the prevalent unintelligent fear of either socialism or individualism, or rather of the sinister and traditional connotation of these words so easily attached to them by any large class that is interested in maladjustment; since in all human history and prevision both these are purely logical and ideal conceptions, and the alternation between their influences is

nothing but an alternation of tendencies that do not culminate. If they are ideals they need not be feared. Those who fear ideals that outrun their times, need only reflect that the prevalence of such ideals is reasonably sure to be retarded by the social ideals of the general mass, ideals which are usually retrospective and portend no change. It is not ignoble, however idle, eagerly and actively to anticipate any approach to mutualization of property, or republicanism, which, not by making *meum* and *tuum nostra*, but, by guaranteeing a little of private ownership to the poor, might mitigate that poverty which is so damning to personality, so corrupting to social ties, so subversive of family affections through the urgency of individual needs.

Not only may the poor gain by readjustment, but the increasing social reprobation of the selfish acquisition and use of wealth, may lead also to the elevation of the rich, may convert some from social ideals like that of the Nariyeri women, who consider it a disgrace not to be sold; may give to others some idealistic leaven of the economic motive, or some inkling that it is not necessary for "riches to be to men of understanding," that "happiness, whether consisting in pleasure or in virtue or in both, is more often found with those who are most highly cultivated in their mind and in their character and have only a moderate share of external goods than among those who possess external goods to a useless extent but are deficient in higher qualities."¹ Under a regime of increased limitation of the possibilities of avaricious accumulation it might still be possible to indulge in the refinements of luxury—monkey dinners, donkey miniatures and the distinction of gout, or any other current refinement of the pride of the Tahitians in the corpulency of their women, as an evidence of prosperity.² Re-

¹ Aristotle.

² Spencer, *Sociology*, ii, p. 202.

striction, such as seems the logical conclusion of history, which leaves the possibility of large enjoyments of the "indefinite residuum" of private property, cannot be sufficient to deprive individuals of whatever their personality requires of the privileges of parasitism, whose effects are diminution of vital powers. Luxury and license and vulgarity can be exhibited without unlimited wealth. The margin between want and superfluity might be narrowed without lessening the freedom of personality to realize any disposition native to itself. Wealth is not absolute but relative. The person whose superiority is egoistic might still be able to demonstrate superiority in property, without the existing gross inequality. Even the altruistic person whose altruism can be demonstrated only in cash need not be deprived of opportunity to display his virtue and thus realize his personality. "The man who should be charitable without view to fruit would attain hereafter to the state of the immortals and even in this life would enjoy all the various gratifications that his fancy could suggest."¹ The pleasures of charity will not be abated by any probable restrictions. "Suppose all fortunes to be equal, suppose all wealth and all misery to be suppressed, no one would have the means of giving, and no one would require alms. Even granting that it were true, you would have suppressed the sweetest, the most charming and the most graceful of human virtues."² No probable equalization can abate the display of the virtue of justice. The history of ownership makes it impossible not to remember the contention of Thrasymachus in the Republic of Plato that justice is the right of the stronger. Any other conception of justice is *a priori*, and not derived from the history of the law. There will always be enough inequality to fortify the just

¹ *Manu*, ii, 2.

² Thiers, *Du droit de propriété*, p. 110.

man in his acquisitions and his dignity. Paine says: "The habit of thinking a thing not wrong leads to thinking it right." The just man, taking advantage of this human trait, may always enjoy the advantages of appropriating his strength to his own uses, saying with Plato: "I will describe around me a picture and shadow of virtue; behind I will trail the subtle and crafty fox."¹ There will still be enough of inequality to inspire Smithian rhapsodies on the division of labor. To quote from the master: "The very different genius which appears to distinguish men of different professions when grown up to maturity is not, upon many occasions, so much the cause as the effect of the division of labor."² The limitation of ownership might go far without disturbing the division of labor, by which "part of society lives without working and part works without living."³ This economic harmony may be preserved, by which society is like the syphonophorae, among which the eating is done by some individuals and the digesting by others. The ascent of individuals to a power, political and economic, befitting the capacities might be unhindered even under some social limitations of the exercise of power. The preference for influence is not destroyed by the diminution of its power of exaction. The sympathy arising from the feeling, "whether one member suffereth, all the members suffer with it," is at least as great a refinement of personality as that repulsion for social suffering which is usually meant by the sensitiveness and refinement that belongs to the "second generation of privilege."

This mutual possession, by

"The instinctive theorizing whence a fact
Looks to the eye as the eye likes the look,"⁴

¹ ii: 365.

² I: ii.

³ Loria, *Economic Foundations of Society*, p. 1.

⁴ Browning.

might lead to some final rhapsody on the possible fulfilment of the current formula of democracy; the approach of the state to the Periclean ideal: "We aim at a life beautiful, without extravagance and contemplative without unmanliness: wealth is in our eyes a thing not for ostentation but for reasonable use."¹ In such a society the poet might rival the broker and contracts be defined, not by Blackstone, but by Shakespeare:

"A contract of eternal bond of love,
Confirmed by mutual joinder of your hands."²

"Among unequals what society
Can sort, what harmony or true delight,
Which must be mutual in proportion due
Given and received."³

Each might have opportunity

"To earn for the body and the mind whatever adheres
And goes forward and is not dropt by death."⁴

It is not now necessary to disclaim unacademic presumption in assailing the gods *Termini*, who at the founding of Rome were the only minor gods that dared to defy Jupiter. It is idle to deny some unacademic personality of purpose in this essay. Truth that is impersonal is not worth pursuit. It is unnecessary to confess the desire to contribute to the mitigation of property by generosity.

¹ Quoted in Pollock, *Science of Politics*, p. 4.

² *Twelfth Night*, ii, line 160.

³ Milton, *Paradise Lost*, viii, 385.

⁴ Walt Whitman.

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VITA

JOSEPH HARDING UNDERWOOD was born in Rockingham county, Virginia, in 1874, son of Irvine Murray Underwood, minister, and Elizabeth Harding Underwood, author. His early education was received in Shenandoah Institute, Virginia, in which institution he was also instructor in Greek. For some years he was engaged in various employments in Kansas, West Virginia, Illinois and Iowa, particularly in printing and farming. At intervals he studied in the following colleges: Central College, Kansas; Western College, Iowa; Mount Morris College, Illinois; and Beloit College, Wisconsin. He received the degree of B. A. from Western College (now Leander Clark College).

He was Graduate Scholar and Fellow in Political Economy in the State University of Iowa, and University Fellow in Sociology in Columbia University in the years 1902 to 1905. He received the degree of M. A. from Iowa University. In Columbia University he pursued courses in sociology under Professors Franklin H. Giddings, Henry R. Seager and H. E. Moore; in economics under Professors Edwin R. A. Seligman and John Bates Clark; in European and American political philosophy under Professor William A. Dunning. He also studied at Chicago University in 1906 under Professor Graham Taylor.

Following his university courses he has held the following positions: Instructor in English and History in Nora Springs Seminary, Iowa, 1905-6; Professor of History and Political Science in Leander Clark College (formerly Western College), Iowa, 1906-7; and Professor of History and Economics in the University of Montana, since February, 1907.

